

No. 40090-1-II

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

STATE OF WASHINGTON,

Respondent,

v.

SEAN P. RYAN,

Appellant.

11 JUN 19 7:16:00  
STATE OF WASHINGTON  
BY [Signature]  
IDENTITY  
Court of Appeals  
Division Two

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

APPELLANT'S OPENING BRIEF  
*AMENDED*

The Honorable James R. Orlando (trial), the Honorable John A. McCarthy  
(competency hearing and sentencing), and  
the Honorables Lisa Worswick, D. Ronald Culpepper and John McCarthy  
(motions), Judges

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A. ASSIGNMENTS OF ERROR

1. Appellant Sean Ryan's Article I, § 9 and Fifth Amendment rights to be free from double jeopardy were violated by and Ryan assigns error to jury instructions 7, 8, 9, 10 and 11 (CP 97-101).<sup>1</sup>
2. Reversal is required based on the prosecutor's repeated acts of serious, flagrant and prejudicial misconduct and misconduct which was constitutionally offensive.
3. Ryan was denied his Article I, § 22 and Sixth Amendment rights to effective assistance of counsel.
4. Ryan's Article I, § 21 and Sixth Amendment rights to a fair trial before an impartial jury were violated.
5. The trial court abused its discretion by improperly admitting expert testimony and inadmissible hearsay.
6. The sentencing court exceeded and improperly delegated its statutory authority and violated Ryan's First Amendment, due process and Article I, § 22 rights by imposing improper conditions of community placement. Ryan assigns error to the following conditions contained in the judgment and sentence, Appendix F and Appendix H:

An offender shall submit to affirmative acts necessary to monitor compliance with court orders as required by DOC[.]

...

(III) The offender shall participate in crime-related treatment or counseling services;

...

(V) The offender shall comply with any crime-related prohibitions.

...

14. Do not peruse or possess pornographic materials. Your Community Corrections Officer will consult with the identified Sexual Deviancy Treatment Provider to define pornographic material.

...

24. You shall not have access to the Internet without childblocks in place.

...

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<sup>1</sup>Copies of the instructions are attached for convenience as Appendix B.

26. Obtain a Chemical Dependency Evaluation by a state-certified Drug and Alcohol Counselor and comply with follow-up treatment.

27. Obtain a Mental Health Evaluation by a state-certified Mental Health Provider and comply with all follow-up treatment to include medications.

CP 231.<sup>2</sup>

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. This case involves multiple identical counts all alleged to have occurred over the same time period. Under State v. Borsheim, 140 Wn. App. 357, 165 P.3d 417 (2007), to protect against violations of the right to be free from double jeopardy, jury instructions in such cases must inform the jury that each conviction must be based upon separate, distinct acts. Were the jury instructions constitutionally defective and must two of the three convictions for first-degree child rape be reversed because the instructions failed to so inform the jury in this case?

2. Is reversal and remand for a new trial on the remaining counts required where the prosecutor committed flagrant, ill-intentioned misconduct and constitutionally offensive misconduct in 1) repeatedly arguing in closing that the jury could not find Ryan “not guilty” unless jurors found that the child victims were lying, 2) repeatedly framing the jury’s role as choosing a side, thus minimizing the state’s burden and inviting jurors to decide based upon an improper “preponderance” standard, and 3) telling jurors Ryan had failed to disprove the state’s case and should be convicted based on this failure?

Further, if the individual acts of misconduct do not compel reversal, does the cumulative effect of those acts require that result because no fair trial could have been had?

3. If the misconduct could have been cured, is reversal required based upon counsel’s ineffectiveness in failing to attempt to seek such a cure?

4. Over defense objection, the prosecutor elicited testimony from a child sex abuse investigator that she had used a

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<sup>2</sup>Copies of the sentencing Appendices are attached for convenience as Appendix C. A supplemental designation of clerk’s papers for the separate Appendix H has been filed.

technique to determine if the accusations were the product of suggestion or coaching and that, in this case, she had determined there was no such suggestion. From another investigator came testimony that she had investigated and made the determination that the victims' mom was not guilty of neglect because she did not know "what was happening" to her children and that this determination was based upon the child forensic interview, which the investigator clearly had found reliable enough to rely on in a professional capacity.

Is reversal required because all of this improper opinion testimony deprived Ryan of his rights to trial by impartial jury, as well as fair trial?

5. Did the trial court abuse its discretion in admitting "expert" testimony from a child interviewer about techniques she used to determine if a child has been subjected to "suggestion," as well as the interviewer's conclusion that the girls in this case had not been so subjected, where the state failed to present a foundation to prove that these techniques were generally accepted in the relevant scientific community?

Did the trial court further err in allowing expert testimony on memory even though the interviewer had no professional qualifications as an expert in memory and the prosecution again failed to provide the required foundation?

And did the trial court abuse its discretion in allowing an interviewer to testify that researchers have discovered that it is "normal" for a child victim of sex abuse to have absolutely no physical symptoms of injury, whether healed or acute, when the state utterly failed to establish that this theory was generally accepted in the scientific community?

6. Did the trial court abuse its discretion in allowing an investigator and two therapists to repeat statements the alleged victims made to them under the hearsay exception for statements made for purposes of medical treatment or diagnosis even though the record did not "affirmatively demonstrate" that the girls knew that they needed to tell the truth when speaking to those state witnesses?

Further, was the testimony inadmissible under the exception allowing hearsay in order to rebut a claim of recent fabrication where there was no such claim?

7. Instead of setting forth all the conditions of community

custody, the court entered several conditions delegating to the Department of Corrections (DOC) the decision of what conditions to later impose, including “crime-related” treatment and prohibitions.

Do these conditions violate Ryan’s due process rights both by failing to give him proper notice and failing to provide ascertainable standards to prevent arbitrary enforcement?

Further, are these conditions an improper delegation by the court of its authority?

Finally, because the conditions allow DOC to set the specifics at some later point in time, do they run afoul of Ryan’s constitutional right to a meaningful appeal by depriving him of the right to have the conditions reviewed by this Court to ensure they comply with statutory mandates?

8. Were Ryan’s due process rights to notice and prevention against arbitrary enforcement further violated, along with his First Amendment rights, by a condition prohibiting him from “perus[ing]” or possessing “pornographic materials” and giving the CCO and treatment provider the authority to define what met that standard?
9. Did the sentencing court exceed its statutory authority in ordering conditions limiting Ryan’s access to the Internet and requiring him to obtain evaluations and comply with treatment for a chemical dependency and for mental health which were not “crime-related” or otherwise authorized by statute?

#### C. STATEMENT OF THE CASE

##### 1. Procedural Facts

Appellant Sean Ryan was charged by information with four counts of first-degree and two counts of second-degree rape of a child, all of which were alleged to be “domestic violence” incidents. CP 1-3; RCW 9A.44.073, RCW 9A.44.076, RCW 10.99.020. After motions on February 28, April 1, 10-11, 2008, before the Honorable Judges D. Ronald Culpepper and Lisa Worswick, trial was held before the Honorable James

Orlando on April 14-17, 21-23 and 30, May 1, 5-7 and 12, 2008, after which Ryan was found guilty of one second-degree count and three of the first-degree counts.<sup>3</sup> CP110-115; RP 1752-58.<sup>4</sup> Further proceedings and a competency hearing were then held on June 4, September 14 and 30 and November 6, 2009, after which the Honorable Judge John McCarthy ordered Ryan to serve an indeterminate sentence with a 260-month minimum. CP 216-32. Ryan appealed and this pleading follows. See CP 282-299.

2. Testimony at trial

Sam and Denni Nelson<sup>5</sup> were married and had two children when, in about 2001, Sam, then a police officer, “did something very stupid while at work.” RP 465-69, 1095-96. The “very stupid” thing was a sex offense involving Sam abusing his position of trust as an officer in order to have sexual contact with a young man in his custody. RP 473-74, 526-28. While Sam initially claimed he was honest with his wife about it right away, he ultimately admitted that was not, in fact, true. RP 529, 540. Instead, Sam initially told Denni that he had been relieved of duty because someone who was in a bar fight was “making this accusation” that he had beat them up. RP 1109. Denni did not actually find out the truth until she saw the charging papers and started getting hounded by media. RP 1110-

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<sup>3</sup>One count of first-degree and one count of second-degree was dismissed as a result of the jury being unable to agree. See CP 116-17.

<sup>4</sup>References to the transcript are explained in Appendix A.

<sup>5</sup>Because they share the same last name, they will be referred to herein using first names, with no disrespect intended.

11.

Nevertheless, Denni, who was 18 when she married the then 25-year old Sam, stood by him through treatment and much of prison. RP 522-24, 1113-15. She finally stopped contact with him when he called her and told her he had had sex with a guy he met on the internet before he had been sent to prison. RP 522-24, 1113-15. At that point, Denni said, she was “done.” RP 1116-17. When Sam was released from custody in January of 2004, she told him that, but Sam was “persistent,” still hoping to reconcile even though he knew Denni had dated someone named Lawrence recently. RP 523-550, 1123-24.

Sam and Denni’s two girls, Co and Ca, were then 9 and nearly five years old, respectively. RP 1091, 1096, 1271. After Sam’s release, Denni did not originally want Sam to have the girls alone because she was concerned about what was best and most safe for them. RP 1124-25. She was not intending to keep them from him completely, however, because her girls needed their daddy and she could not see “having a man defined by the worst moment of his whole life.” RP 1125. The kids were becoming a “big issue” with Sam, who was calling Denni and making comments making her think he was going to just take the girls away and make her try to get them back. RP 1127. Getting a “parenting plan” in place was, in fact, a big reason for Denni’s decision at this point to get a divorce. RP 1127.

Even after the parenting plan established that Sam had custody every other weekend and for a chunk of time in summer, Sam said that he and Denni always had conflicts over custody issues. RP 469, 1128-29.

Sam complained that Denni was demanding about changes in visitation and expected him to make changes for her but was unwilling to return the favor. RP 471. Denni made the same complaint about Sam. RP 1157. Sam was also not paying child support, so much so that the state had placed a lien on his car in an attempt to collect. RP 472-73.

Sam also accused Denni of not taking care of the girls as well as he did, saying that she had not taken them to the dentist or doctor or followed on treatments after they got lice - which Sam admitted Denni thought they had gotten from his place. RP 554. Denni explained that she had not had the money to take the girls to the dentist and they had not needed to go to the doctor or she would have taken them. RP 1308-1309. She also described all of the efforts she had made on the lice issue and said Sam was so obsessed about it that he was disagreeing with school nurses and causing disruption about whether the girls had lice or not. RP 1308-1309.

Sam was also unhappy that Denni had let their condo go into foreclosure while he was in prison. RP 552. He admitted, however, that his crime was the cause of the financial hardship for the family and he and Denni had even been sued civilly over it. RP 522-25, 552.

At some point, Co made allegations that Lawrence, Denni's boyfriend for a short time, was abusing Co, first saying he had spanked her or something similar and then telling her mom that he had raped her. RP 534-35, 1277-78. Years later, when she was in counseling, Co asked her therapist to tell her mother that she had lied about the rape. RP 1271. At trial, Co said, "Lawrence didn't do anything. Did you hear me?" RP 711. Co confirmed, however, that he had hit her with a belt buckle and that she

had told people about that when it happened. RP 711.

Denni found out about the alleged hitting when Co showed a bruise to a school counselor and said it was from Lawrence hitting her with a belt. RP 1349. The counselor told Denni that something about where the bruise was and all the things Co was saying “just didn’t quite add up.” RP 1349. Denni had noticed the bruise but Co said she had gotten it when she was outside and it was left at that. RP 1349-51. Later, Co told Denni that it had actually happened when she fell off the swing set but she was mad at Lawrence for pushing her. RP 1350.

By trial, however, Co was again saying it had happened when Lawrence had hit her with a belt. RP 680.

A little while after Sam was released, Denni met Sean Ryan. RP 1120. Denni and Ryan got to know each other as friends, then dated. RP 1120-21. Ultimately, in November of 2004, they began living together, along with Denni’s girls, who were then 5 and 9 years old. RP 1091, 1093, 1129-30. Ryan, Denni and the girls lived at the “Jet” apartments, where the girls stayed most of the time, except for every other weekend, when they were with Sam. RP 536, 1130-31. For much of the time at the “Jet,” the girls lived together in the room just next to Denni’s bedroom. RP 1153.

Denni was back in school and working and Ryan was still in the military. RP 1133-34. Denni noticed that not only did the girls seem to really like Ryan but also their “behaviors” started to improve, they were getting their schoolwork done and “they were doing really well.” RP 1135. The girls also wanted Ryan to be with them, pushing them on the

swing or jumping on the trampoline together. RP 1145.

A friend, Eric Wright, and his daughter, P.W., were always at the apartment, hanging out, cooking dinner and playing games. RP 1147-48. Denni's girls and P.W. would go to the boys and girls club after school together most of the time, too, where someone would pick them up. RP 951, 962, 1143.

Sam still wanted to get back together with Denni even after she started dating Ryan, and the girls told him that they, too, wanted their mom and dad to get back together. RP 525-46, 718, 733. In the summer of 2005, however, Ryan and Denni were still together and were flying across the country to meet Ryan's mother while the girls were with their dad. RP 551. Denni had told Sam that she and Ryan were going to get married and that they were going to move with the girls to the east coast. RP 478-80, 1147. By the middle of 2006, a date was set for the wedding for a lucky date in the Asian culture from which Denni came, although that date ended up not working because Ryan's mother could not make it. RP 1149-50, 1201.

In July of 2006, Denni, Ryan and the girls moved to Puyallup, to give Co another year of elementary school and move from a bad neighborhood. RP 1169, 1199. P.W. still came to visit every other weekend, staying in a room with one or both girls. RP 1170-77.

According to Sam, the girls complained about Denni to him, saying she was more strict than she was and that she would get angry and hit them. RP 542. When Sam asked them, however, "if there were any marks," there never were. RP 542, 557. Sam conceded that the girls

seemed to like Ryan a lot and talked about doing homework and going places with him. RP 544. Indeed, the girls had very few complaints about Ryan during this time. RP 544. Ca actually said she did not like it when Ryan was not home when she and Co got home from school, because that meant that Co was in charge and she was “[m]eaner than” Ca’s mom. RP 603.

In April of 2007, when Denni received a letter from the school about some attempted abductions of children, she had conversations with the girls about safety and “good touch/bad touch” as well as strangers. RP 1190-91.

Throughout 2007, Co had a “constant, constant argument” with her mom about wanting to live with her dad - especially when Co was asked to do things like clean up the kitchen. RP 540, 1178, 1192. Sam admitted that the girls always asked him if they could come live with him, especially if they had a “tough” week at their mom’s. RP 539-41. Sam and Co even talked about when Co would be able to have her own voice in the matter, with him telling her the “state” would start listening to what she wanted when she was about 13. RP 541-42.

In June of 2007, Co was having that same fight with her mom about living with Sam when her mom finally told her that Sam was a sex offender and she could not live with him because no friends could ever come over, he could not go to her school and there would be other limitations. RP 540, 684. Co did not initially believe her mom, even calling her a liar, until she was shown a sex offender website. RP 540, 684, 1204-1207. After that, Co took it hard and apologized for blaming

her mom all those years for “Daddy going away.” RP 1208.

At the same time, there had been some issues with Sam about scheduling the summer time visit, and Denni had told Sam, “[y]ou need to spend as much time with your daughters as you can,” because as soon as Ryan was done with school, they were “going to leave the state.” RP 1210. Ryan had two children who were living in Virginia and he wanted to move closer to them. RP 1320-21. Co and Ca did not want to move away and they also thought “Daddy would be sad.” RP 1232.

Just a few weeks later, on July 27, 2007, when the girls had just spent their first four days of a six week visit with Sam, the girls made claims that Ryan had sexually abused them. RP 483-84. Sam said he heard the girls arguing about who was going to tell him something and he said, “tell me what?” RP 480-81. Ca “ended up saying” that Ryan was “hurting them.” RP 481-82. Ca was “very hesitant” and when Sam asked if she meant hitting, she said, “[n]o,” and then put her hand down over her private parts, saying “[h]e’s hurting us,” and “[y]ou know.” RP 482. Sam then started questioning the girls, trying to “get some clarification.” RP 483-84. He said he was able to determine there was “penetration” although he did not know exactly where. RP 483-84.

At trial, when Ca was 9 and in third grade, she testified that Ryan had hurt her, that she had talked with Co about it, and that they had never told their mom because “we thought it would hurt her feelings.” RP 575-89. When asked how Sean hurt her, Ca did not really know how to say it but she thought it was “sexually assault,” a phrase she had heard from her dad, who had told her what it meant. RP 594, 604.

At trial, Ca first said that Ryan did not do anything other than put his “number one” into her “number two.” RP 619. She maintained that she had never told anyone anything else had happened, but then admitted that she had, in fact, told her sister that something had happened with his finger. RP 619. She also remembered telling her dad that Ryan had put his number one in her mouth. RP 619.

Ca also testified that Ryan used only his “number one” spot to touch her and nothing else. RP 596. A moment later, the prosecutor suggested, “[d]id he ever use his hands or his mouth or anything else to touch you?” RP 596. Ca then said he used his hands but had touched her on her number two spot only with his number one. RP 596.

Ca could not remember how long it was after Ryan moved in that it first happened and did not remember telling investigators he would put his number one in her number two every other day. RP 605-606. She also did not remember telling them that she was four years old when it started. RP 606.

In fact, at the time Ryan started dating her mom, in spring of 2004, Ca was five. RP 1091-93, 1129-30. In November of 2004, when he moved in, she was nearly six. RP 1091-93, 1129-30.

Ca did not remember the first time it happened, nor did she remember the second, third or fourth time. RP 610-12. Although she initially said she did not remember the last time it had happened, she then said it was just before she was supposed to go to her dad’s. RP 612. She was going to take a shower and Ryan came in and “did it” to her. RP 612. She said he had clothes on and he put his number one in her number two,

not saying anything. RP 613. Ca did not know which day of the week it happened. RP 614. Ca also was confused about where she had heard about good touch/bad touch, first saying she had talked to her dad about it but then, a moment later, saying she had not. RP 605.

Ca said that, sometimes when it happened, she would cry and scream. RP 607. At trial, she said it only happened when her mom was not at home. RP 607. She admitted, however, that she had told her dad, to the contrary, that her mom had been home sometimes when it occurred. RP 607. Sam confirmed that the girls had ultimately said it happened when Denni had gotten home from work and was just in the shower, or that it also happened when Ryan got home from work sometimes at one in the morning when Denni would also have been there. RP 547-48.

A neighbor who lived right next door at the Jet apartments and had essentially the same apartment testified that the walls and acoustics were such that, when her daughter was in her bedroom talking to herself, the neighbor could hear it clearly in the other room. RP 988. Denni confirmed that she could hear the girls in the next room even if they were just talking, although she did not tell the girls that this was how she knew “[i]f they were plotting to do something naughty,” instead keeping it one of her “mommy tricks.” RP 1153-54.

At trial Sam said that, looking back on the time of the alleged abuse, there were “emotional” things that should have been a “clue” to him that something was going on, such as Ca being 9 years old and still wetting the bed. RP 545. Sam first claimed that Ca had only been doing it “just about [since] the time that I have been out” of prison, which would

be right around when Ryan came into Ca's life. RP 545, 1129-30. A moment later, however, Sam admitted that Ca had been bed-wetting since she was an infant and it had been an ongoing problem for her whole life. RP 545. Sam still declared that he thought the "bed-wetting" was a "by-product of abuse, sexual abuse." RP 548.

Denni confirmed that Ca had been wetting beds since the time of potty training, well before Ryan was in their lives. RP 1167, 1309.

Ca admitted that she was at her dad's every other weekend, around relatives and people she felt comfortable with and liked, and she never said anything to anyone about the abuse she was now claiming had occurred or of any problems with her pooping or anus. RP 599, 615-17.

Ca also admitted that she sometimes lied to get her sister into trouble and had gotten in trouble for lying to the school after skipping classes and apparently forging some documents. RP 520, 620, 622. She maintained that she was not lying in court and initially answered the question of what would happen if she did so by saying two words, "Remann Hall." RP 622.

Before trial, however, her answer had been different. RP 623. When asked pretrial what would happen to her if she lied in court, her answer had been, "[w]hat can they do to me?" and "I am only 9 years old." RP 623.

Co, who was 13 years old at the time of trial, testified that the touching had started with Ryan touching her in between her legs, not in a particular place, sometimes over her clothes, sometimes under. RP 641-44. At some point, she said, he started making her take off her clothes.

RP 644. She said she would be standing and he would touch her with his fingers in or outside her vagina. RP 645. She said he also touched her anus, and “in between my legs, most of the time.” RP 645.

Co said that Ryan only “attempted a few times” to put his penis in her vagina or anus but did not ever succeed. RP 647. According to Co, the reason he did not succeed was because she “got mad at him” and “didn’t let him do it.” RP 713-14. The girl admitted that, physically, Ryan was bigger and stronger, but she denied that he could have overpowered her, saying what mattered was in the “heart.” RP 714. Indeed, she said, Ryan never threatened her, was never violent and never hit. RP 652, 727.

Co said she and Ca started talking about it when, at some point, Ca told Co the same thing was happening to her. RP 653.

Co said that the touching mostly happened when her mom was at work and it only lasted short time each time, 10-15 minutes. RP 649-51. Co also said sometimes it hurt and he would rub petroleum jelly on her “private parts.” RP 651-52. According to Co, it happened sometimes when they were on the couch watching TV and sometimes in the bedroom. RP 642. Sometimes she would not see what was going on because she was either watching TV or not “paying attention.” RP 643. She said that, once it moved from just touching, she or he would put a pillow on herself because she did not “want to watch.” RP 648.

At trial, Co said the touching started when they lived at the Jet in 2004, a “few months” or “four to five, six [months] maybe” after Ryan moved in. RP 641-42. She said it continued when they moved to

Puyallup. RP 641-42.

When talking to a social worker she saw after the claims had been made, however, Co had claimed, to the contrary, that it had only been going on since they moved to Puyallup, which was “the entire school year of 2006/2007.” RP 285.

According to Co, at one point, her sister called Co to the bathroom and showed her a little blood on a piece of toilet paper, saying it was from a private part but “not exactly where.” RP 661, 712-13. Co said it made her “kind of concerned.” RP 712-13. Co nevertheless never talked to her mom about it, or told her dad her sister was bleeding, or anything similar. RP 712-13.

Co admitted that, as of the date of trial, Ca still had that bleeding. RP 719. Co maintained that it was “different now” because now it was not caused by Ryan but instead by Ca’s habit of rushing to poop and getting blood from “where she goes number two.” RP 719.

Like Ca, Co admitted she had never told anyone anything was happening when they lived in the Jet Apartments or Puyallup. RP 653-55. Sam confirmed that he never had any indication that the girls were physically hurting in any way. RP 536, 549.

Denni said neither Co nor Ca had any problem asserting themselves and “telling” on each other or other kids and had even “told” on teachers who had done things they did not like at school. RP 1185.

Even at the time of trial, Co admitted she still wanted her parents to get back together. RP 718, 733. Co conceded that she had probably told her mom she was a bad mother when she was upset at her and had

told her mom “God hates divorce.” RP 732. She had gotten that from Sam’s mom, who told Ca and Co that “fact” and had also told the girls that, “in God’s eyes” Sam and Denni would always be married. RP 1375. Indeed, Co continued saying “God hates divorce” even after the allegations were made, parroting that phrase in a defense interview. RP 728.

Co complained that her mom was a “control freak,” which she defined as not being willing to let Co do things she wanted to do and not giving the girls “an opinion” on certain things, like how much freedom they had. RP 690.

In contrast, Co talked about liking Ryan and doing “fun things” with him, and about how he would stand up for the girls when their mom was giving them discipline that he thought was undeserved. RP 636-38. She admitted making a point of asking her mom to tell Ryan she missed him a lot and loved him when they called from vacation. RP 721-22.

Co said she knew what was going to happen after the allegations were made, because she was smart and had sometimes watched Court TV. RP 737-39. She also had good friends who had previously told her they had been sexually abused. RP 731. She said that she had not watched any Court TV shows on sex cases and denied getting in trouble for watching the show. RP 694-965, 723. A moment later, however, she conceded she had, in fact, gotten into such trouble. RP 724.

The same night they spoke to Sam, the girls were examined at a hospital. RP 268-81, 487-89. There, Ca made no claim that there had been anything that had happened with her anal area. RP 192, 286, 292. Co only made a claim of “touching” but did not say anything about any

anal or vaginal sex. RP 192, 286, 292. Indeed, Co's claim that there had only been "touching" was why the hospital did not test her for sexually transmitted diseases, although a social worker said there was some vague talk about "possible penetration or oral sex." RP 192, 268-81.

The emergency room physician, Dr. Jeffrey Blake, physically examined both girls in their vaginal and rectal areas, looking for any injuries. RP 312-13. He found none. RP 312-13, 333. There were no signs of irritation, or trauma, or abrasions, contusions or lacerations, bruises, scrapes, or cuts. RP 313. There was no evidence of bleeding or infection or redness or discharge, either. RP 313.

To Blake, neither girl made any claims of anal sex. RP 310. Co complained of no symptoms, was "pooping" regularly and reported no issues in that area. RP 310, 317, 331-32. Ca complained only of a bladder infection but reported nothing about any unusual bowel symptoms or stools and had normal bowel sounds. RP 330-31. Co also denied any psychosocial symptoms like fear or a desire to harm herself. RP 332.

Blake testified that there were "some controversies" about how quickly anal and hymenal injuries heal and how to "date" them. RP 318. He also said there were some common misperceptions that every time a girl had sex it would break the hymen. RP 314, 318, 324. In addition, Blake said, someone could be abused and not have "physical findings" even ten minutes afterwards if, for example, they were simply fondled. RP 315.

Although he had less experience with anal injuries, based on his knowledge and experience, the doctor stated that, if an adult male was

anally penetrating an 8-year old every other day for two years with their penis into the anus he would expect to see some injuries. RP 322-23, 337. He said that it was “all about tissue stretch” and “the rectum can only be stretched so far.” RP 341. He also noted that the instinct for a child would be to tense up and tighten their rectum and “[i]f you are trying to force against that, that’s going to likely cause injury.” RP 342.

Keri Arnold-Harms, a child interviewer with the Pierce County prosecutor’s office, interviewed the girls a few days after Blake saw them. RP 353-367. From Ca, the interviewer elicited, *inter alia*, that Ryan had put his penis in her anus and it “hurt and made me sad,” that she had her stomach touching the bed at the time, that he kept doing it when she cried, that it “usually” happened in the “number two place,” that it would hurt to go number two after, that he used his finger in “the number one place,” that she “wouldn’t let him inside her” so he used baby oil, that he “bribes” her with money and “stuff,” and that he once put it her mouth and stopped when she gagged. RP 1636-1644, 1740. She also said she was on her stomach and he would put a pillow on her face and lay on her. RP 1639. She did not, however, explain how, if she was on her stomach, the pillow would cover her face rather than pushing her head into the bed. RP 1639.

According to Ca, the gagging incident occurred when she was eight. RP 1741. But in fact, Ca did not turn eight until 2008, fully six months after the girls made their allegations and Ryan had been arrested. See RP 1091, 1093, 1129-30.

After their interviews with Arnold-Harms, the girls talked with eachother about them. RP 496. Indeed, Sam admitted, the girls got into

an argument about when things supposedly happened. RP 547.

On August 7, 2007, Michelle Breland, a pediatric nurse practitioner at the Child Abuse Intervention Department, saw the girls and conducted physical, “colposcopic” and anal exams. RP 426, 428, 430. Co and Ca told Breland a little about the allegations, with Co saying, *inter alia*, that it was in her “bottom,” not in her “privates.” RP 440. Ca also said that, afterwards, she noticed bleeding “[w]here I go number two, and it hurt to go poop and sometimes it stings when I go pee.” RP 440. She did not know when it last happened. RP 437, 441.

Neither Ca nor Co had any injuries whatsoever on their hymen or vaginal area, whether healed or current. RP 438, 441. Co’s anus was completely normal and had no indication of any healed or current injury, while Ca’s anal area was normal with something called an “anal tag,” which “can be a normal finding.” RP 438-41. Ca’s anus had no tears, lacerations, fissures or anything indicating injury. RP 446-47. Breland admitted that, in most children if someone was trying to penetrate their sphincter, they would usually constrict their muscles. RP 453.

Breland conceded that, while the hymen does not always get injured with penetration, a hymen without ample tissue or with breaks in the tissue might indicate that penetration had occurred. RP 449. Notches, mounds or defects in the hymen would also be of concern. RP 449. None of those were found on either Co or Ca. RP 438-441, 460.

The girls went to counseling, starting with Phoebe Mulligan on August 9, 2007. RP 784, 1281. Mulligan testified that Ca had expressed a desire to hurt herself by scratching herself (RP 979-98), wanted her mom

to “learn how to control her anger and stop being violent” (RP 799), “wished she could go to bed knowing she would be safe” (RP 800), and was afraid her mom would marry Ryan and “they would be abused forever.” RP 801. Mulligan said that Co also had concerns about hurting herself and that was where Ca had gotten the idea to do so. RP 801.

Mulligan admitted that Co told her that she had lied when she claimed that Lawrence had raped her. RP 802-803. Co wanted Mulligan to tell her mom that she had lied about that. RP 802-803. According to Mulligan, Co said she did it in order to scare Ryan that she would tell on him too. RP 802-803. At trial, Co repeated that same claim, that she did it because she wanted to “intimidate Sean,” i.e., show him that she and her sister would tell if he continued. RP 681. Co admitted that she had first made the claim of abuse by Lawrence to her mom when Ryan was not around. RP 679, see RP 1344. Later, Denni and Ryan asked her about it and she ultimately claimed that he had tried to pull her pants down and when she said no he said either do it or take a beating so she took a beating. RP 1344-45. All of this was an elaborate lie, as Co admitted at trial and to Mulligan. RP, 678, 1345-47.

After a few sessions with Mulligan, the girls started seeing another therapist, Carlin Harris. RP 1281. At trial, Harris was allowed to testify that Co said she had gotten “hurt” by her mom’s boyfriend, that she had bad dreams and nightmares, that she was concerned Ryan might come and find her because she “told,” that she had dreams about Ryan hurting her and her family, that one of those dreams involves him lining the girls and her mom up and shooting them “like Al Capone” because they “told” and

then dumping her body in the water, that another dream involved him causing her to drown, that she was anxious about seeing Ryan in person at the trial, that she had a “fear” of that and had a particular strategy “not to look at him,” and that the “hurting” had happened in the vaginal area using both hands and penis. RP 859-64.

Harris admitted that, in November of 2007, Co told Harris that “Jesus had been telling her lately that she’s being selfish for wanting her dad to pay more attention to her.” RP 1046.

Regarding Ca, Harris was allowed to testify that the girl said about Ryan, “[h]e scares me and he comes to get me,” that Ryan was “putting his body on us,” that Ca was having physical trouble sleeping, bad dreams, nightmares, scary thoughts during the day and did not trust people and feared they would hurt her. RP 865. Harris also was allowed to testify that the girl had said it was “normal” to do the “hurting,” that the girl had flashbacks where her body hurt, that she thought her mom did not want to be with them, that she felt “sick” whenever she thought of Ryan and the trial, that she had “[f]ear” of seeing Ryan’s face but that she was not going to look at him because “she’s the boss of her eyes.” RP 866-69. Like Co, Ca admitted that, even months after Ryan’s arrest, their big wish was for their parents to fall in love again and remarry. RP 1037.

P.W. and her father, Eric Wright, testified about being at the apartment all the time when Denni and Ryan lived at the Jet. RP 578-79, 944-49, 1140-43. P.W, Co and Ca would all go to school together and get picked up by Ryan or Wright from school or the boys and girls club. RP 951. P.W. and the girls would dance, watch TV, color, make posters and

do other things most of the day, “most everyday.” RP 944-51. P.W., who would sleep in Ca’s room when she spent the night, said the girls got along “pretty good” with Ryan, and P.W. never saw anything wrong happen and had no problems with Ryan herself. RP 952. Neither Ca nor Co ever said anything to P.W. about anything improper going on. RP 579, 954.

Wright, said he and P.W. were around the family probably five days a week, picking up the girls, eating the dinners Ryan would cook, going fishing and other things. RP 962, 1143. Ca’s first grade teacher confirmed that, most days, when she saw Ryan at the school it was with P.W.’s father, because they “came together.” RP 1081.

In all the time Wright spent with them, the girls always acted normal and seemed happy around Ryan except when they were disciplined. RP 966-67. Even when Wright was alone with them, they never said anything about being hurt by Ryan. RP 968. A neighbor at the Jet saw the girls with Ryan frequently and said the girls were always “very happy,” clearly “loved him,” and acted like they “wanted to be with him all the time,” often “[h]anging on him like he was a jungle gym.” RP 983-84.

At trial, the school counselor with whom Co talked almost daily and often ate lunch testified that Co never exhibited any kind of fear of Ryan. RP 1069. Ca’s first grade teacher, who had a very close relationship with the girl, saw both Ca and Co interact with Ryan at school and said Ca especially was “eager” to see Ryan when he came, having no “reticence” around him. RP 1077-78. That same teacher said Ca was “not a follower,” did what she wanted to do and was “strong-willed.” RP 1082.

The teacher also said that Ca would “initially deny” when caught in a lie and then would be “very persistent” in maintaining a lie even when “you see it with your own eyes,” although she thought Ca would usually end up coming clean most of the time. RP 1083-84.

George Lummus, Denni’s father, has a Master’s degree in psychology with an emphasis in counseling, saw Ryan with the girls all the time and said they exhibited no signs which would indicate to Lummus there was anything improper going on. RP 901-907. Indeed, the girls would run up and hug Ryan and have him sit with them to help with their homework or play with him. RP 907. Lummus also spent time alone with the girls, taking walks with them and serving as a confidant. RP 908. He said that, based on his experience, if someone wanted the girls to do something that they had no desire to do, they would refuse and tell the person why. RP 933. At the time the girls raised the allegations, Lummus said, Denni’s plans to move had become more final and she had a specific timeline. RP 929. The girls were not happy about the move although they acted happy about the wedding. RP 909.

Pastor Darren Bryant had known Ryan and Denni for 7-8 years, interacted with them on a daily basis and spent a lot of time with their family, especially when they lived at the Jet. RP 883-36-88. Bryant observed that the girls actually seemed to like Ryan more than their mom, wanting to talk only to him sometimes if they called on the phone. RP 889. Bryant never saw the girls act afraid of Ryan and they only seemed to get mad at him when he was disciplining them. RP 889.

Ryan testified about getting married young, having two children,

getting his GED, joining the military and meeting, falling in love with and moving in with Denni after the divorce from his first wife. RP 1400-1507. He discussed the schedule of his work, his leaving the military, his going back to school and getting other jobs and spending a lot of time with Wright and P.W. RP 1420-47.

Ryan flatly stated that he had never touched the girls in any improper way. RP 1470-71. Neither he nor Denni, Lummus, Wright or Bryant tried to hide the fact that, just as in any family, there were times when he was alone with the girls, at home or driving them places or whatever. RP 889-91, 927, 969, 971-72, 1329-30, 1420, 1429, 1495.

Ryan was shocked when he heard the accusations but still loved the girls, even though they were making false accusations against him. RP 1471-72.

Initially, when contacted by CPS, Denni said this was a “lot to take in, she had a lot of decisions to make, and [she] needed to think about some things.” RP 1551. By the next contact, however, Denni said she was “no longer in shock and was now mad,” expressing that she did not believe what the girls were claiming had actually happened. RP 1551-52. Denni had gotten medical records, talked to doctors and done whatever she could to try to figure out what was going on. RP 197-98, 1298.

At trial, Denni was repeatedly faulted for refusing to participate in therapy with the girls regarding the abuse and for not having contact with them much after the allegations were made. RP 1275-83. She explained that she did not want to participate in or encourage what she felt were false accusations and was concerned that she might end up being accused of

something, too. RP 1282. She did not want anyone to be able to “in any way, shape or form” say that she had “influenced, coerced, scared, intimidated” the girls into saying something. RP 1263-64. She was worried that, “God forbid . . .they actually start telling the truth and then I am going to be accused of motivating that.” RP 1269.

Denni also explained that she had not returned a “safety plan” to a CPS worker when told she needed to do so to get the girls back, because she had concluded based upon her dealings with CPS that there was no way they were going to give the girls back so long as Denni did not believe their claims. RP 1255-58.

Sometime after Ryan was taken into custody, Co made allegations that her mom had abused her by throwing a pot of coffee on her, had engaged in “physical abuse” and had thrown a bookcase. RP 1220. There was no discussion at trial about what happened with those claims. RP 1220.

Denni no longer had plans to marry Ryan, no matter how much she loved him, because regardless of the outcome of the trial, she, Ryan and the girls would never feel “okay” with the girls and Ryan living in the same house again. RP 1300-1301.

Billie Reed-Lyyski, a CPS worker, testified at length about talking to Denni, disputing whether she had told Denni she had to leave the house in order to get her children back and whether Denni had suggested putting the children into foster care rather than letting Sam keep them. RP 1217, 1550-62. Reed-Lyyski admitted that, at the time she had first contacted Denni, Reed-Lyyski thought Denni was a suspect for “neglect of the

children,” something for which Denni might be subject to dependency or termination procedures. RP 1561. She told Denni that she was “the subject” of potential claims, “as well as her paramour,” Ryan. RP 1562.

Denni explained that she told Reed-Lyyski that she thought there were “influencing factors” and she was uncomfortable with the girls staying with Sam or his family. RP 1247. Denni had issues with Sam’s family even before this time and did not like to leave the girls with them because they were really “judgmental” and “overly religious.” RP 1392. Denni said a “neutral location” would be away from her family, too, and that meant foster care even though it was not what Denni really wanted. RP 1251-1252.

A detective who went to Denni’s home to gather evidence said she was a little embarrassed about the condition of the house and had company due in 5-10 minutes, so she needed to meet him at another time. RP 874, 1288. Denni said the “company” was someone to whom she was trying to sell the furniture and things. RP 1288. When the detective came back several days later, Denni was cleaning and there were no sheets or pillow cases on the beds. RP 880. The detective also said he had spoken to Denni about diaries Co said she had but Denni had said she would not look for them because they did not exist. RP 882. Co had said that she had written about what was happening in two diaries, but also that she had ripped all of the relevant pages out at one point. RP 681-82. Denni said she had called Co’s best friend to ask if there was a diary she did not know about and was told “no.” RP 1291.

Denni stated her belief that the girls had started not sleeping well

and having nightmares and problems not because Ryan had committed the crimes but because the girls were feeling guilty. RP 1285. Sam confirmed that both girls had been having nightmares and that Ca was insisting all the doors be locked, wanting to know if she was going to be protected. RP 504. Co expressed anger, frustration, was scared and had some nightmares. RP 504.

D. ARGUMENT

1. RYAN'S STATE AND FEDERAL RIGHTS TO BE FREE FROM DOUBLE JEOPARDY WERE VIOLATED AND TWO CONVICTIONS MUST BE DISMISSED

Both the state and federal constitutions prohibit multiple punishments for the same offense. See, State v. Noltie, 116 Wn.2d 831, 848, 809 P.2d 190 (1991); Ex Parte Lange, 85 U.S. 163, 168, 21 L. Ed. 2d 872 (1873); Fifth Amend.; Art. I, § 9. As a result, a defendant cannot be subject to more than one conviction for the same crime based upon the same act. See, e.g., State v. Ellis, 71 Wn. App. 400, 403-404, 859 P.2d 632 (1993). This prohibition against double jeopardy is especially at issue in cases where, as here, there are multiple identical counts alleged to have occurred within the same charging period. See, e.g., State v. Hayes, 81 Wn. App. 425, 431, 914 P.2d 788 (1996). In such cases, in order for the jury instructions to be constitutionally adequate, they must sufficiently inform the jury “that they are to find ‘separate and distinct acts’ for each count.” Borsheim, 140 Wn. App. at 368, quoting, Hayes, 81 Wn. App. at 431 (quoting, Noltie, 116 Wn.2d at 846). If the instructions do not satisfy that requirement, reversal and dismissal of all but one of the affected counts is required. Borshiem, 140 Wn. App. at 368; see State v. Berg, 147

Wn. App. 923, 198 P.3d 539 (2008).

In this case, reversal and dismissal of all but one of the counts of first-degree child rape is required, because the jury instructions failed to inform the jury that it had to find “separate and distinct acts” to support each conviction and, as a result, Ryan’s rights to be free from double jeopardy were violated.

a. Relevant facts

The relevant instructions for the four first-degree child rape charges were proposed by the prosecution and ultimately given as Instructions 7-11.<sup>6</sup> CP 50-80, 97-101. Instruction 7 provided the “unanimity” instruction for the four first-degree charges, as follows:

The State alleges that the defendant committed acts of rape of a child in the first degree on multiple occasions. To convict the defendant on any count of rape of a child in the first degree, one particular act of rape of [a] child in the first degree must be proved beyond a reasonable doubt and you must unanimously agree as to which act has been proved. You need not unanimously agree that the defendant committed all the acts of rape of a child in the first degree.

CP 97. Instructions 8, 9, 10 and 11, the “to convict” instructions for the charges, were identical and provided the elements of the crime as follows:

(1) That on or about the period between the 2<sup>nd</sup> day of February, 2004, and the 27<sup>th</sup> day of July 2007, the defendant had sexual intercourse with Ca. N.;

(2) That Ca. N. was less than twelve years old at the time of the sexual intercourse and was not married to the defendant;

(3) That the defendant was at least twenty-four months

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<sup>6</sup>The same defects exist in the instructions for the second-degree child rape charges, Instructions 13-15. See CP 103-106. Because there was only one conviction on that charge, however, the same double jeopardy issue is not present.

older than Ca. N.; and

(4) That the acts occurred in the state of Washington.  
CP 98-101.

Counsel objected to these instructions on the grounds that they created a double jeopardy problem because all of the counts had exactly the same elements listed and the claims were for multiple days. RP 1598-1601. After the prosecutor said he was going to amend the instructions to specify a “physical location” for each act, the court said that sounded fine. RP 1601. The next day, however, the prosecutor had changed his mind, deciding not to give such specifics. RP 1618-19. The trial court then overruled Ryan’s objection, saying it thought the instructions given were sufficient and did not create a “double jeopardy problem.” RP 1621; CP 97-101.

b. The instructions violated Ryan’s rights to be free from double jeopardy

The trial court erred in giving the instructions, because those instructions violated Ryan’s rights to be free from double jeopardy by failing to tell the jurors they had to rely on separate and distinct incidents for each conviction. Borsheim, supra, is directly on point. In that case, the defendant was charged with and convicted of four counts of first-degree child rape. Borsheim, 140 Wn. App. at 362. The allegations arose after the 11-year old daughter of Borsheim’s girlfriend, with whom he lived, told her grandparents in 2003 that Borsheim had been sexually abusing her. Id. The charges were framed in identical counts, alleging rape “during a period of time intervening between September 1, 2000 through

September 8, 2003.” 140 Wn. App. at 363. Borsheim had lived with the girl and her mother since February of 2001 and, at trial, the girl testified that he would take showers with her “on a daily basis” and force her to submit to vaginal or oral sex almost every weekday for the 2 ½ years they lived with him, in eight of the nine homes in which they lived. 140 Wn. App. at 363.

On appeal, Borsheim argued that the jury instructions violated, *inter alia*, his rights to be free from double jeopardy. 140 Wn. App. at 364. The instructions included an instruction which told the jury that, because the state was alleging acts which occurred “on multiple occasions,” to convict Borsheim, “one or more particular acts must be proved beyond a reasonable doubt and you must unanimously agree as to which act or acts have been proved beyond a reasonable doubt” but that the jurors need not unanimously agree that “all the acts have been proved beyond a reasonable doubt.” 140 Wn. App. at 364. The jury was also told that a separate crime was charged in each count. *Id.* Each “to convict” instruction used identical language, saying the jury had to find as an element “[t]hat during a period of time intervening between February 1, 2001, and September 5, 2003, the defendant had sexual intercourse with” the girl. *Id.*

On review, Division One agreed that the trial court’s were improper and failed to prevent violations of the prohibition against double jeopardy because they “allowed the jury to base each of [the] four convictions on proof of a single underlying event[.]” 140 Wn. App. at 362. None of those instructions, the court noted, “specifically state[d] that

a conviction on each charged count must be based on a separate and distinct underlying incident and that proof of any one incident cannot support a finding of guilt on more than one count.” 140 Wn. App. at 365. This was a violation of double jeopardy, not “unanimity,” because the jury was told it had to be unanimous as to the specific act in order to convict but was not told that the same act could not be relied on for more than one conviction. 140 Wn. App. at 365. Reversal and dismissal of all but one of the convictions was therefore required. Id.; see also, Berg, 147 Wn. App. at 934-35 (where no “separate and distinct act” instruction was given and no other instructional language made the requirement clear, reversal and dismissal of all but one of the relevant counts was required).

This Court has followed Division One. See, State v. Carter, 156 Wn. App. 561, 234 P.3d 275 (2010) (following Berg, supra). In Carter, the defendant was charged with multiple counts for alleged abuse spanning several years. Carter, 156 Wn. App. at 564-65. As in Borsheim, the court gave nearly identical “to convict” instructions, a “separate crime has been charged in each count” instruction and a unanimity instructions which told the jurors they could convict on any count if they unanimously agreed that an act had been committed. Carter, 156 Wn. App. at 564-65. Also as in Borsheim, those instructions were found insufficient to protect the defendant’s double jeopardy rights. Carter, 156 Wn. App. at 567-68. Based on the error, this Court dismissed three of four first-degree child rape convictions. Id.

Here, as in Borsheim and Carter, the “unanimity” instruction for the first-degree counts told the jurors that the state was alleging acts on

multiple occasions and that to convict on any count the jury must unanimously agree which act was proved. CP 97. And just like in Borshiem and Carter, the “to convict” instructions were essentially identical to each other and used the very same time - “on or about the period between the 2<sup>nd</sup> day of February, 2004, and the 27<sup>th</sup> day of July 2007” - in each. CP 98-101. Nothing in the instructions, however, informed the jury of the requirement that the convictions had to be based on separate and distinct acts. CP 97-101. Thus, just as in Borsheim and Carter the jury instructions in this case were insufficient to prevent violation of Ryan’s rights to be free from double jeopardy and reversal and dismissal of two of the three first-degree convictions is therefore required.

In response, the prosecution may attempt to argue that its closing argument somehow “cured” the error. Any such attempt should be rebuffed. In closing, the prosecutor noted that the “to convict” instructions were identical and involved, “[s]ame time frames, same acts.” RP 1674. He then went on to say the four counts were as follows: “Count I, in the bedroom,” “Count II, on the couch,” “Count III, in the mom’s room,” and that Count IV was for oral sex right before one of the girls went to see her dad when she was eight years old. RP 1674. The prosecutor also told the jury that it only had to find “an act occurred that is considered sexual intercourse,” which was any penetration with any part of his body, something the prosecutor said the girl had said “lots and lots of times this happened in the bedroom.” RP 1675-76. The prosecutor then told the jurors they did not have to all agree on the same act or the same alleged day when abuse occurred to convict, and that the same was true for count

II on the couch, count III in the mom's room, count IV, the oral count. RP 1676.

This argument by the prosecutor was not sufficient to remedy error in the jury instructions. The jury was specifically instructed not only that it was not to consider the arguments of the prosecution that were not supported by the instructions (CP 89) but also that the jury had a duty to accept the law from the instructions regardless what their "personal belief" about what the law is or should be. CP 88. Jurors are presumed to follow instructions. See State v. Johnson, 124 Wash.2d 57, 74-75, 873 P.2d 514 (1994).

Further, it is clear that, even after that argument, the jury was still unclear about what the counts addressed, as they specifically sent out a jury note which asked:

Question 1: On counts regarding Co[] (5 + 6 ) is count 5 related to penetration of the vagina and count 6 related to the penetration of the anus or: are counts 5 + 6 related to the location the alledged [sp] assault occurred?

Question 2: On counts 1-4 related to Ca[], are counts 1-3 related to to the location of the alledge[sp] abuse and count 4 related to oral sex?

CP 81-82.

In any event, it is questionable whether the arguments of the prosecution can "cure" defective instructions. See State v. Kier, 164 Wn.2d 798, 812-13, 194 P.3d 212 (2008). As Division One noted in the very same context:

[T]he double jeopardy violation at issue here results from omitted language in the instructions, not the State's proof or the prosecutor's argument. The State offers no authority for the proposition that evidence or argument presented at trial

may remedy a double jeopardy violation caused by deficient instructions. And our courts have recognized that “[t]he jury should not have to obtain its instruction on the law from the the arguments of counsel.” Rather, it is the judge’s “province alone to instruct the jury on relevant standards.”

Berg, 147 Wn. App. at 935-36, quoting, State v. Aumick, 126 Wn.2d 422, 431, 894 P.2d 1325 (1995), and, State v. Clausing, 147 Wn.2d 620, 628, 56 P.3d 550 (2002).

Because the instructions on the first-degree counts were insufficient to protect against violation of Ryan’s rights to be free from double jeopardy, and because Ryan was convicted of three of those counts, two counts should be reversed and dismissed under Borsheim.

2. RETRIAL IS REQUIRED ON THE REMAINING COUNTS BECAUSE THE PROSECUTOR COMMITTED FLAGRANT, ILL-INTENTIONED MISCONDUCT; IN THE ALTERNATIVE, COUNSEL WAS INEFFECTIVE

Prosecutors are “quasi-judicial” officers, with a duty to act in the interests of justice, not just as heated partisans, at trial. Berger v. United States, 295 U.S. 78, 88, 55 S. Ct. 629, 79 L. Ed. 2d 1314 (1935), overruled in part and on other grounds by Stirone v. United States, 361 U.S. 212, 80 S. Ct. 270, 4 L. Ed. 2d 252 (1960); State v. Suarez-Bravo, 72 Wn. App. 359, 367, 864 P.2d 426 (1994). As part of that duty, prosecutors are required to refrain from engaging in conduct which is likely “to produce a wrongful conviction.” State v. Clafin, 38 Wn. App. 847, 850, 690 P.2d 1186 (1984), review denied, 103 Wn.2d 1014 (1985). Further, because the words of a prosecutor carry great weight with the jury, those words may ultimately deprive the defendant of his state and federal constitutional due process rights to a fair trial. See Donnelly v. DeChristoforo, 416 U.S. 637,

94 S. Ct. 1868, 40 L. Ed. 2d 431 (1974); Suarez-Bravo, 72 Wn. App. at 367; 5<sup>th</sup> Amend.; 6<sup>th</sup> Amend.; 14<sup>th</sup> Amend.; Art. I, § 22.

In this case, reversal and remand for the counts remaining after the dismissal required as set forth in argument 1, *infra*, is required, because the prosecutor repeatedly committed flagrant and ill-intentioned misconduct in multiple ways and the result was that Ryan was deprived of a fair trial. In the alternative, counsel was ineffective.

a. Misstating the jury’s role, presenting them with a “false choice,” misstating the law and radically minimizing his burden of proof

i. Relevant facts

The prosecutor’s theme in closing argument was that the jury’s role was to decide the case based on which version of events - Ryan’s or the prosecutor’s - the jury chose to “accept.” RP 1628-31. The prosecutor told the jury that they would “have to accept” the defense version - and thus find that the girls were coached - “**to find him not guilty.**” RP 1627-28 (emphasis added). A moment later, the prosecutor said that the jury would have to find that the girls were making it up, i.e., accept the “defense perspective” “**to find Ryan not guilty.**” RP 1629 (emphasis added). Counsel objected to this “[i]mproper burden shifting” and the court told jurors to “refer to their instructions as to what their role is in the case” but also that “this is closing argument.” RP 1630.

The prosecutor then moved on to posit the question of why the girls would make up such stories and continue telling them even when they became unhappy about missing their mom. RP 1631. He answered

himself, saying that it “[d]efi[ne]s common sense when we are talking about these two little girls.” RP 1630. The prosecutor then declared, “[b]ut you **have to accept that version to find Mr. Ryan not guilty.**” RP 1631 (emphasis added).

A moment later, the prosecutor told the jury:

in the end it’s a pretty simple case, right? **Because you’re left with one decision. Did they tell the truth or did they make this up?** Because if they told the truth, if what they said was true on the DVD you saw and on the stand, then he’s guilty. There’s no doubt. If what they told you happened happened, then he’s guilty. **If they made it up, then he’s not guilty.**

RP 1631-32 (emphasis added).

In later argument, the prosecutor told the jury it should ask if the defense “makes any sense” and if it is supported by “any evidence, any piece of evidence.” RP 1672. The prosecutor then went on:

**The only way he’s not guilty, the only way the State didn’t meet its burden is if you believe that they were not telling the truth.** That’s really the only issue for you to decide. Because if they are telling the truth, he’s guilty. And if they weren’t, he’s not guilty. It’s pretty simple.

RP 1672 (emphasis added). The prosecutor concluded, “[i]f you that she was just regurgitating what dad told her to say, then Mr. Ryan is not guilty.” RP 1742.

ii. The arguments were flagrant, ill-intentioned misconduct

These arguments were completely improper, flagrant and ill-intentioned misconduct. It is well-settled that it is “misleading and unfair to make it appear that an acquittal requires the conclusion” that the prosecution’s witnesses are lying. State v. Casteneda-Perez, 61 Wn. App.

354, 362-63, 810 P.2d 74, review denied, 118 Wn.2d 1007 (1991).

Indeed, this type of “false choice” argument has been roundly condemned as misstating the law, the state’s burden of proof and the jurors’ role. See State v. Barrow, 60 Wn. App. 869, 876, 809 P.2d 209, review denied, 118 Wn.2d 1007 (1991). The argument misstates the jury’s role because the jury is *not* required to determine who is telling the truth and who is lying in order to perform its duty. Id. Instead, it is only required to determine if the prosecution has proven its case beyond a reasonable doubt. State v. Wright, 76 Wn. App. 811, 824-26, 888 P.2d 1214, review denied, 127 Wn. 2d 1010 (1995).

Further, the choice presented by the argument is “false” because it improperly tells jurors that either the state’s witnesses or defense witnesses are lying and there are no other options. Barrow, 60 Wn. App. at 876.

But this is not true even if the various versions of events are inconsistent.

Id. Instead:

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

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

Thus, in State v. Fleming, 83 Wn. App. 209, 921 P.2d 1076 (1996), the prosecutor’s “false choice” argument was misconduct even though the victim and defendants had fundamentally opposed versions of the case. 83 Wn. App. at 213. The defendants were accused of raping the victim in her home and the sole issue was whether the sexual contact was consensual. 83 Wn. App. at 213. The prosecutor told the jury it would have to find

that the victim lied, was confused, or just fantasized what had happened in order to find the defendants not guilty. 83 Wn. App. at 213. In finding the argument to be serious misconduct, the Fleming Court declared, “[t]he jury would not have had to find that [the victim] was mistaken or lying in order to acquit; instead, it was *required* to acquit *unless* it had an abiding conviction in the truth of her testimony.” 83 Wn. App. at 213 (emphasis in original). In fact, the Court noted, the jury could be unsure she was telling the truth, or question her ability to recall, or have some other question about the state’s case and thus have to acquit - none of which would require a finding she was lying. Id.

Finally, the argument misstates and minimizes the prosecutor’s burden of proof by converting the case into a decision about which side to choose, rather than holding the prosecutor to his constitutionally mandated burden of proof. With the arguments, the jury is effectively told to “pick a side.” And that argument tasks them with choosing “which version of events is more likely true, the government’s or the defendant’s.” See United States v. Gonzalez-Balderas, 11 F.3d 1218, 1223 (5<sup>th</sup> Cir.), cert. denied, 511 U.S. 1129 (1994). As a result, the jury is misled into thinking they simply must decide which version of events they think is more likely to be true and then rely on that “preponderance” standard in rendering their verdict. Id.

Here, the prosecutor committed this well-recognized misconduct not once or twice but repeatedly in closing argument. Over and over, the prosecutor specifically told the jurors that they had to find that the girls were lying in order to acquit. The case was “pretty simple,” the prosecutor

declared, because the jury had only “one decision,” which was “[d]id they [Co and Ca] tell the truth or did they make this up?” RP 1631-32. The only options the jurors had were 1) either the girls were telling the truth and Ryan was guilty or 2) the girls were lying and Ryan was innocent. RP 1631-32. Indeed, the “only way” that Ryan could be found not guilty, the prosecutor declared, and “the only way the State didn’t meet its burden” was if the jurors found that the girls “were not telling the truth.” RP 1672. This was “really the only issue” the jurors had, the prosecutor said, and it boiled down the entire decision in the case until it was “pretty simple” - “[i]f they are telling the truth, he’s guilty. And if they weren’t, he’s not guilty.” RP 1672.

Notably, these arguments went beyond the usual in their implication that the jurors have to “choose sides.” Repeatedly, the prosecutor made it clear that the case was a battle of dueling positions from which the jury was required to choose. Jurors were told they could not find Ryan “not guilty” unless they accepted his version of events rather than that of the prosecutor. RP 1627-28. The jury would “have to accept” the defense position, have to see the “defense perspective,” have to accept the defense “version,” and have to make the “choice” between the two versions of events in order to decide the case, the prosecutor declared. RP 1627-29, 1630, 1631.

But in fact, the jury was not required to make such a choice, nor was that the proper standard to be applied. The jurors could have disbelieved Ryan but still acquitted if they found that the prosecution failed to present sufficient evidence to prove its case beyond a reasonable

doubt. The jury also did not have to find that the young girls were lying in order to acquit - it simply had to have a reasonable doubt about Ryan's guilt. The jury was also not limited to the two choices of finding the victims to be lying or finding guilt. Instead, it could have simply found that the completely uncorroborated claims of girls who both admitted to having lied to get people in trouble in the past and who had no physical signs of abuse whatsoever were insufficient to prove Ryan's guilt beyond a reasonable doubt. Rather than having to decide the girls were lying in order to acquit, jurors simply had to have a reasonable doubt that the state had proven its case. The prosecutor's arguments were serious, flagrant misconduct and this Court should so hold.

b. Further shifting the burden

The prosecutor also minimized his constitutionally mandated burden of proof still further when he repeatedly implied that jurors should convict because Ryan had failed to *disprove* the prosecution's claims.

i. Relevant facts

As part of the prosecutor's theme, he repeatedly faulted the defense for failing to present any evidence that the girls were coached. RP 1628-29, 1631, 1672. He also argued that, in cross-examination of the girls, "**he [the defense] didn't establish that this didn't happen.**" RP 1656 (emphasis added). Indeed, the prosecutor said, there was not only no evidence that Ca had been coached but also "**no evidence that this did not happen to her.**" RP 1657 (emphasis added).

Later, the prosecutor asked the jury to question whether the defense

“makes any sense” and if it is supported by “**any evidence, any piece of evidence.**” RP 1672 (emphasis added). He also said that the defense had “**provided no evidence that what they [the girls] said is not true or that somebody coached them to do this.**” RP 1672 (emphasis added).

In sum, the prosecutor said, what the jury was left with was both whether it believed the girls “[a]nd are you presented with any evidence that what she said is not true?” RP 1677 (emphasis added). The prosecutor said, “I am asking you to believe what the girls told you **because there’s no evidence not to believe them.**” RP 1677 (emphasis added).

- ii. These arguments improperly shifted the burden to Ryan to disprove the state’s case, applying a presumption of guilt

These arguments were further misconduct. Under the state and federal due process clauses, the prosecution bears the constitutional burden of proving every element of the crime charged beyond a reasonable doubt. See In re Winship, 397 U.S. 358, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970); State v. Cleveland, 58 Wn. App. 634, 648, 794 P.2d 546, review denied, 115 Wn.2d 1029 (1990), cert. denied, 499 U.S. 948 (1991).

When a defendant presents a case, the prosecution is entitled to make proper comment on the failures of that case, within constitutional bounds. Those bounds have recently been described by this Court:

A prosecutor may commit misconduct if he mentions in closing argument that the defense did not present witnesses or explain the factual basis of the charges or if he states that the jury should find the defendant guilty simply because he did not present evidence to support his defense theory.

State v. Jackson, 150 Wn. App. 877, 885, 209 P.3d 553, review denied, 167 Wn.2d 1007 (2009). Thus, it is permissible to comment that the state's evidence is stronger than the defense or that the defense evidence is somehow lacking, provided the prosecutor does not imply that the defendant was required to present evidence or argue that he should be found guilty based on the failure to do so. Id.

Here, the prosecutor's argument strayed far beyond the permissible bounds. Repeatedly, the prosecutor told the jury that Ryan had a burden he failed to meet; that Ryan "didn't establish that this *didn't* happen" (RP 1656) (emphasis added), that there was "no evidence that this did not happen" (RP 1657), and that the defense had "provided no evidence" to prove the girls were not telling the truth or were coached (RP 1672).

Further, the prosecutor exhorted the jury to convict Ryan based upon his failure to present evidence to disprove the state's case, telling the jury it needed to ask if it had been "presented with any evidence that what she said is not true" (RP 1677) and even "asking" the jury to "believe" the girls - and thus convict - "because there's no evidence not to believe them." RP 1677 (emphasis added).

With these arguments, the prosecutor told the jury - repeatedly - both that Ryan had a burden to disprove the state's case and that Ryan should be convicted for failing to present evidence to rebut the state's case. These arguments were flagrant, ill-intentioned misconduct and this Court should so hold.

c. Reversal is required

There is a strong argument which could be made that the

misstatement of the law and shifting the burden of proof to Ryan to disprove the state's case should be examined under the constitutional harmless error standard, which compels reversal unless the prosecution meets a heavy burden of proof. See, e.g., State v. Easter, 130 Wn.2d 228, 922 P.2d 1285 (1996) (applying constitutional harmless error standard to improper closing argument commenting on exercise of right); see also, State v. Warren, 165 Wn.2d 17, 26 n. 3, 195 P.3d 940 (2008) (noting that the Court has not yet decided whether constitutional harmless error standards should apply in cases where misconduct affects a constitutional right but is not a direct comment on exercise of a right). There can be no doubt that these comments relieved the prosecutor of the full weight of his constitutionally mandated burden of proof, shifting the presumption of innocence on its head and telling the jury it should effectively apply a presumption to convict and convict Ryan because he had not disproved the state's case. And the prosecution clearly could not even begin to satisfy the heavy burden of satisfying the constitutional harmless error standard. That standard requires the prosecution to prove, beyond a reasonable doubt, that every single reasonable jury which could possibly be put together would have convicted Ryan even without this improper misconduct. See, e.g. Easter, 130 Wn.2d at 242. Indeed, prejudice is presumed and reversal mandated unless the prosecution meets this heavy burden. See id. And where the evidence is conflicting and credibility is important, constitutional error cannot be deemed harmless. See, e.g., State v. Romero, 113 Wn. App. 779, 783-85, 65 P.3d 1255 (2005).

But even under non-constitutional standards regarding misconduct,

reversal would be required, both for the misconduct in shifting the burden of proof and in telling the jurors they had to find the girls were lying in order to acquit. Under the non-constitutional standard, where counsel objects to misconduct below, reversal is required where there is a substantial likelihood the misconduct affected the verdict. See State v. Henderson, 100 Wn. App. 794, 800, 998 P.2d 907 (2000). Reversal will be required even absent objection below if the misconduct was so flagrant and ill-intentioned that it could not have been cured by instruction. See, e.g., State v. Boehning, 127 Wn. App. 511, 518, 111 P.3d 899 (2005). Further, reversal is required based on counsel's ineffectiveness if the misconduct could have been cured by instruction but counsel failed to object or seek such instruction, there is no legitimate tactical reason for that failure and the failure is prejudicial. State v. Madison, 53 Wn. App. 754, 763-64, 770 P.2d 662, review denied, 113 Wn.2d 1002 (1989).

Here, counsel specifically objected to the “[i]mproper burden shifting” the prosecutor made when arguing that the jury would have to find that the girls were making it up, i.e., accept the “defense perspective” to find Ryan “not guilty.” RP 1629. The court’s only response was to tell the jurors to “refer to their instructions as to what their role is in the case” and that it was “closing argument.” RP 1630. Given this tepid response to counsel’s very valid objection, it seems difficult to fault counsel for failing to continue to raise the same objection over and over as the prosecutor continued to tell the jurors they had to find the two girls were lying in order to acquit, and that they had to choose between one side or the other to decide.

Further, there is more than a substantial likelihood that this misconduct affected the verdict. This very same argument has been called by our courts “misleading and unfair,” and misstates the law, the state’s burden or proof and the jurors’ role. Castaneda-Perez, 61 Wn. App. at 362-63. Here, given the weaknesses of the state’s evidence - the inconsistent claims of the girls, the bias and interests of the father, the inconsistent behavior of the girls, the lack of any physical evidence whatsoever, the lack of any disclosure of any kind until just when they are told they will be having to move away from their dad when Ryan married their mom, the fact that one of them had admittedly falsely accused someone else of having raped her - there is much more than a substantial likelihood that this misconduct affected the verdict. And such a likelihood compels reversal even if there is sufficient evidence to convict the defendant. See Suarez-Bravo, 72 Wn. App. at 368.

In addition, even if counsel’s objection was not sufficient to cover all of the misconduct, it was all clearly flagrant and ill-intentioned. Fully 14 years ago, in Fleming, the Court found that it was flagrant and ill-intentioned misconduct for the prosecutor to tell the jury it had to find that the state’s witnesses were lying in order to acquit. Fleming, 83 Wn. App. at 214. And the reason the Fleming Court found the argument to be such clear misconduct was that the prosecutor’s argument had been made two years after they had been declared improper - not 14 years, as here. Id.

In addition, the misconduct in telling the jury that Ryan had a burden to disprove the case that he somehow failed to meet and that he should be convicted based on that failure cannot be seen as anything other

than flagrant and ill-intentioned misconduct. The due process mandate of the prosecutor to shoulder the burden of proving his entire case is not a new concept. Unfortunately, neither is the efforts of prosecutors to relieve themselves of the full weight of the burden by making arguments such as those made here. See State v. Traweek, 43 Wn. App. 99, 106-107, 715 P.2d 1148, review denied, 106 Wn.2d 1007 (1986), overruled on other grounds, overruled on other grounds by State v. Blair, 117 Wash.2d 479, 816 P.2d 718 (1991).

Both types of misconduct also could not have been “cured” by instruction. The ideas behind the misconduct - that the jury had to figure out who was telling the truth and decide the case on that basis and that a defendant should be able to disprove something if he is not guilty of it - are the kind of arguments which reflects the common way that people make decisions in their everyday lives. These evocative concepts are the kind of argument likely to stay with the jury, regardless of any attempt at a “cure.” And these arguments are particularly damaging, because people are willing to make decisions in their personal lives even when they have a great deal of uncertainty. State v. Anderson, 153 Wn. App. 417, 431-32, 220 P.3d 1273, review denied, \_\_\_ Wn.2d \_\_\_ (November 2010). This is why such argument effectively minimizes the prosecutor’s burden of proof. See, e.g., Holland v. United States, 348 U.S. 121, 140, 75 S. Ct. 127, 99 L. Ed. 150 (1954).

Indeed, all of the misconduct in this case went directly to the jury’s ability to properly evaluate whether the prosecution had, in fact, met its burden. And it is well-recognized that “[p]rosecutors presumably do not

risk appellate reversal of a hard-fought conviction by engaging in improper trial tactics unless the prosecutor feels those tactics are necessary to sway the jury in a close case.” Fleming, 83 Wn. App. at 215.

In addition, even if each individual act of misconduct did not compel reversal, the cumulative effect of the misconduct, taken together, would. Such a result is required where there is a substantial likelihood that the cumulative effect of the misconduct affected the verdict. State v. Jones, 144 Wn. App. 284, 300-301, 183 P.3d 307 (2008). And there is more than such a likelihood in this case.

Here, the misconduct all went directly to the jury’s ability to fairly and impartially decide this case. First, they were improperly told they had to find the child victims were lying in order to acquit - something obviously likely to elicit strong negative reaction in the already emotionally-charged environment of a case involving alleged child sex abuse. Next, the prosecutor misled them into applying a far more lenient burden of proof than required by telling them they had to choose between the two “sides” in making their decision. Third, the jurors were told they had to decide who was telling the truth in order to decide the case. Fourth, they were told that Ryan had a burden to prove that the girls were lying or coached and had failed in that burden. And fifth, they were told they should believe the girls - and thus convict Ryan - because Ryan had failed to disprove the state’s case. The corrosive effect of every one of these acts of misconduct was to the jury’s understanding of its crucial function and the extremely high burden the state had to shoulder. Even if they would not compel reversal standing alone, the cumulative effect of all of the

repeated acts of misconduct would.

It must be remembered that the jury had some serious problems with the state's case. The jurors obviously did not all believe all the claims against Ryan, because they were unable to convict on two of the counts. See CP 116-17. And it took the jury Wednesday afternoon, all day Thursday and Friday until 3, and then from 9 to lunch the next day of trial before they had a decision on most of the counts. RP 1749. Given the lack of evidence other than the statements of the girls, given the inconsistencies, and given the testimony about previous lying and accusations casting a shadow on the credibility on those statements, it seems doubtful the jury would have convicted on even one count had this misconduct not occurred. Reversal and remand for a new trial on the counts remaining after the dismissal argued for in argument 1, *infra*, is required.

d. In the alternative, counsel was ineffective

In the alternative, even if this Court were to find that the prosecutor's multiple acts of misconduct to which counsel did not object were not so flagrant and ill-intentioned that they could not have been cured by instruction, reversal is still required because counsel was prejudicially ineffective in failing to object and at least try to mitigate the serious prejudice the improper argument caused his client. Both the state and federal constitutions guarantee the right to effective assistance of counsel. Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); State v. Hendrickson, 129 Wn.2d 61, 77-78, 917 P.2d 563 (1996), overruled in part and on other grounds by Carey v. Musladin, 549 U.S. 70,

127 S. Ct. 649, 166 L. Ed. 2d 482 (2006); Sixth Amend.; Art. I, § 22. To show ineffective assistance, a defendant must show both that counsel's representation was deficient and that the deficiency caused prejudice. State v. Bowerman, 115 Wn.2d 794, 808, 802 P.2d 116 (1990). Although there is a "strong presumption" that counsel's representation was effective, that presumption is overcome where counsel's conduct fell below an objective standard of reasonableness and prejudiced the defendant. See State v. Studd, 137 Wn.2d 533, 551, 973 P.2d 1049 (1999).

While in general the decision whether to object or request instruction is considered "trial tactics," that is not the case in egregious circumstances if there is no legitimate tactical reason for counsel's failure. Madison, 53 Wn. App. at 763-64; see also Hendrickson, 129 Wn.2d at 77-78. In such cases, counsel is shown ineffective if there is no legitimate tactical reason for counsel's failure to object, an objection would likely have been sustained, and an objection would have affected the result of the trial. State v. Saunders, 91 Wn. App. 575, 578, 958 P.2d 364 (1998).

Here, those standards have been met. There could be no legitimate tactical reason for counsel to have failed to object to any of the misconduct further if that was what was required for his client. While in general it could be strategic to decide not to object to and thus emphasize misconduct which occurs in passing, here, this misconduct was not fleeting - it was pervasive. There could be no tactical reason for counsel to let the prosecutor's repeated, flagrant misconduct to go so unchecked. And the court would have erred if it had not sustained any objections and properly instructed the jury.

Even if this Court finds that the improper opinions and comments could somehow have been “cured,” reversal of the counts remaining after the dismissals discussed in argument 1, *infra*, is still required based on counsel’s ineffectiveness in failing to make such attempts.

3. RYAN’S RIGHTS TO TRIAL BY IMPARTIAL JURY WERE REPEATEDLY VIOLATED BY THE ADMISSION OF IMPROPER OPINION TESTIMONY AND THE COURT ABUSED ITS DISCRETION IN ADMITTING IMPROPER EXPERT OPINION

Both the state and federal constitutions guarantee the defendant in a criminal case the right to trial by impartial jury. See State v. Lane, 125 Wn.2d 825, 838, 889 P.2d 929 (1994); Sixth Amend., Art. I, §21. As part of those rights, the defendant is entitled to have the jury serve as the “sole judge of the weight of the testimony” and credibility of witnesses. Lane, 125 Wn.2d at 838, quoting, State v. Crotts, 22 Wash. 245, 250-51, 60 P. 403 (1900). For this reason, no witness, lay or otherwise, may testify in a way which conveys an opinion regarding the veracity or credibility of a witness or the guilt of the defendant. State v. Demery, 144 Wn. 2d 753, 758-59, 30 P.3d 1278 (2001). Such “opinion testimony” is improper because it invades the “exclusive province” of the jury to decide guilt or innocence. State v. Black, 109 Wn.2d 336, 348, 745 P.2d 12 (1987).

In this case, reversal is required, because the court repeatedly admitted, over defense objection, improper opinion testimony from prosecution witnesses, and these constitutional errors are not harmless. Further, some of the evidence improperly admitted was improper “expert” testimony.

a. Improper testimony of Arnold-Harms

i. Relevant facts

Before Arnold-Harms, the prosecutor's interviewer, testified, counsel objected, *inter alia*, to testimony about "techniques" Arnold-Harms supposedly had used to determine if improper suggestion had occurred with the girls. RP 350. Counsel argued that such testimony would improperly tell the jury Arnold-Harms' "opinion they weren't coached in any way." RP 350. The court overruled the objection but granted Ryan a "standing objection." RP 351.

Ryan also argued that there had to be some evidence presented by the state to prove that the "techniques" Arnold-Harms was going to talk about were actually proven through studies or scientific rigor to have some degree of accuracy. RP 381. The court did not agree that there had to be some "scientifics" to prove that these questioning techniques worked, because the jury could decide whether it believed Arnold-Harms was an expert who should be believed. RP 382.

At trial, Arnold-Harms was allowed to testify 1) that she uses her particular technique of interviewing because she wants to prevent "suggestibility" (RP 351-60), 2) that she had used those techniques with the girls (RP 351-60, 387-88), 3) that she used "methods" to "assist in determining" whether a child had been coached (RP 361-85), 4) that certain things such as a child's language could indicate "suggestibility" (RP 387), 5) that she had seen no indicator in her interaction with Ca that the girl "had been coached or suggested an answer" (RP 387-88) and 6) that she had no "concerns about suggestibility playing a factor in this

interview.” RP 388. She also said, regarding the taped interview of Ca

When it comes to issues of suggestibility, the things that I would be looking for is certainly if this is a child that is able to correct me, a child that can tell me no, a child that can tell me when she doesn't know something or if she thinks that I have gotten something wrong.

And those were all things that were present in this interview. She told me that.

RP 386 (emphasis added). Over further objection, Arnold-Harms then repeated, “[t]hose things were present in this interview,” providing detail about those “things.” RP 386. Arnold-Harms was also allowed to testify, over repeated defense objection, regarding such things as development of memory in children, “script memory” and other things she said affected children when disclosing about abuse. RP 360-66. And indeed, she testified about the “layers of memory” in children as including physical and emotional memories, and how ability to provide details can be evidence that something happened with frequency. RP 365.

In closing argument, the prosecutor specifically relied on the “suggestibility” evaluations of Arnold-Harms, saying it was something Arnold-Harms had to “determine” in her job and that she had said there were “no signs of suggestibility” Ca’s interview on the DVD. RP 1646.

ii. Arnold-Harms gave improper opinion testimony and unsupported “expert” testimony

The court abused its discretion and violated Ryan’s rights to trial by jury in admitting this testimony, because it was improper opinion testimony on guilt, veracity or credibility and was not admissible under ER 702.

First, the testimony was improper opinion testimony. Testimony need not be a direct comment such as “I think he’s guilty” to amount to an

improper opinion; an “inference” is enough. See State v. Farr-Lenzini, 93 Wn. App. 453, 459-60, 970 P.2d 313 (1999). Where there is only an “inference,” however, the issue may not be raised for the first time on appeal. See, e.g., State v. Kirkman, 159 Wn.2d 918, 936-38, 155 P.3d 125 (2007). Only if there is “explicit or near explicit” comment on credibility, veracity or guilt will the error be manifest constitutional error which can be so raised. Id.

Here, Ryan repeatedly objected to the improper opinion testimony of Arnold-Harms, even after he had been granted a “standing” objection by the court. See RP 351-88. Thus, he is not raising the issue for the first time on appeal and the improper opinion testimony need not be “explicit or near explicit” before this Court will examine the error. See Farr-Lenzini, 93 Wn. App. at 459-60.

But indeed, the comments in this case meet even that high standard. This determination is made by looking at the challenged testimony in light of 1) the type of witness involved, 2) the nature of the testimony, 3) the charges, 4) the nature of the defense, and 5) the other evidence. Demery, 144 Wn.2d at 759 (quotations omitted). An examination of the factors shows the testimony was explicit or near-explicit improper opinion testimony. Arnold-Harms, a government employee, told jurors not only that she had a way of determining if a child was being “coached” or was susceptible to suggestion but also that Arnold-Harms had used that method on the girls and determined there was no sign of their answers being “suggested.” RP 351-88. The nature of that testimony is obviously a comment on the girls’ veracity and credibility.

Further, the comments were clearly improper opinion testimony on Ryan's guilt based upon the charges, the defense and the other evidence. The charges depended upon the testimony of the very witnesses about whom Arnold-Harms was expressing an opinion. The defense was that the girls were being manipulated into lying. Given that, the comments, which went directly to whether such manipulation had been "found" by the investigator, were plainly explicit comments on the veracity and credibility of the girls' statements. And those statements and the other statements and the other statements of the girls were the only evidence against Ryan: there was no physical or medical evidence, no contemporaneous incidents or complaints or exhibition of symptoms of anything improper going on.

Put simply, the investigator's testimony told the jurors that Ca and Co, the prosecution's crucial witnesses, had been tested by the prosecutor's "expert" and found *not* to have been suggested the answers to the questions. This testimony amounted to explicit or near explicit comments on guilt, veracity or credibility.

In addition, the testimony was inadmissible as "expert" testimony. Under ER 702,

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

The proponent of the testimony must meet a three-part burden, which is to 1) qualify the witness as an expert in the relevant field, 2) prove that any opinion testimony is "based on a theory generally accepted by the scientific community" and 3) prove that the testimony will be helpful to the trier of

fact. State v. Jones, 71 Wn. App. 798, 814, 863 P.2d 85 (1993), review denied, 124 Wn.2d 1018 (1993). While experience as a CPS worker may be sufficient to qualify one as an “expert” on certain things, testimony from such a witness still “must be based upon a scientific principle or explanatory theory that has gained general acceptance in the scientific community.” Id.

Using this “stringent” standard, courts have excluded such things as evidence regarding “rape trauma syndrome” because there is no “typical” response to rape and the literature did not support it, Black, 109 Wn.2d as 346-47, and a caseworker’s assertions that certain behaviors or experiences such as nightmares are “indicators” of child abuse. State v. Maule, 35 Wn. App. 287, 296, 667 P.2d 96 (1983). Similarly, it has been held improper to allow a caseworker to testify that sexually abused children exhibited typical behaviors because this theory of “particular identifiable” behaviors “was not shown to be supported by accepted medical or scientific opinion.” Jones, 71 Wn. App. at 817.

Here, at the outset, it is highly questionable whether Arnold-Harms qualified as an “expert” in child memory. Further, her testimony that she has had generalized “training” dealing with “memory or memory retention” and knew of unnamed, unspecified “literature” on the topic does not prove she is an “expert.”

In addition, the prosecutor failed to prove that Arnold-Harms’ opinions were based upon techniques and theories generally accepted in the scientific community. The improperly admitted testimony told jurors that certain interviewing techniques prevent and can even detect whether a child

is suggestible or has been subjected to suggestion. It also said that a child's memory acts in a particular way. But the prosecution presented absolutely no evidence that these techniques and theories were generally accepted in the scientific community. There was nothing proving that these particular questions or techniques used by Arnold-Harms had been subject to any rigor or even that others agreed with her beliefs about them. Further, the testimony was akin to "profile" testimony because it told the jurors that certain things would be present if a child was susceptible to suggestibility and had been given improper suggestion.

As the Jones Court noted, there is distinction between "a caseworker narrowly testifying to the behavior of abused children seen in a specific practice" and more generalized assertions of behavior as to abused children as a class. Jones, 71 Wn. App. at 817-18. When a caseworker or investigator testifies only as to personal experience, that is permissible. Id. But where, as here, the caseworker makes "generalized statements" regarding the behavior of children as a class (here the class of children who are susceptible to suggestion and the class of children who have been subjected to such suggestion), "the testimony crosses over to scientific testimony regarding a profile or syndrome, **whether or not the term is used.**" Jones, 71 Wn. App. at 818 (emphasis added). As a result, the prosecution was required to prove not only that Arnold-Harms was an expert in the relevant field but also that her opinions were based upon theories which were generally accepted in the scientific community. Because it failed to do so, the court erred in admitting the testimony over

defense objection.

b. Improper expert opinion of Breland

Breland also gave improper “expert” testimony. Before Breland, the pediatric nurse practitioner, took the stand, counsel moved to prevent her from testifying that a complete lack of evidence of any physical trauma could be indicative of child abuse. RP 394-404. The court overruled the objection that such testimony would be improper opinion testimony. RP 394-404. At trial, Breland was allowed to testify about “studies related to findings in cases of sexual assaults on children,” including that such studies have included efforts to confirm actual abuse and link back to any physical findings. RP 412. Counsel’s repeated objections that there was insufficient foundation that the studies were generally accepted in the scientific community were overruled, with the court saying Breland could testify as to her knowledge of the research and how she relied on it. RP 413, 414-15.

At that point, Breland testified about kids who had not disclosed for a long time and what their injuries looked like, what the “studies have shown” about the time elapsing since the last contact and how that made it “less likely you are to find anything on the exam,” that the “anal injury” studies indicated that only “one percent” of children “had any sort of anal findings,” and that boy prostitutes had been studied after claims of anal penetration and “there’s very, very few sort of anal injuries or scars or any sort of medical findings regarding that.” RP 417. She also testified that her experience in having dealt with 2,000 or so claims of sexual abuse that only about five percent showed injury, whether healed or acute. RP 424.

In closing argument, the prosecutor repeatedly relied on Breland’s

“expert” testimony about the “studies” she had looked about anal injury and that she told the jury that only “less than one percent” had shown it. RP 1648-49. He also discounted the testimony of Dr. Blake that he would expect to see some injury based on the claims, saying that Breland’s testimony was from the “expert” Blake had said he would defer to. RP 1649. He concluded that the lack of any medical evidence whatsoever was not evidence to “doubt” the girls that they had been abused. RP 1648-50, 1719-20.

Again, the trial court admitted improper “expert” testimony without foundation. The prosecution presented absolutely no evidence whatsoever to establish that the theory that it is “normal” for children who have been anally penetrated to show no injury is a theory which is “generally accepted in the scientific community.” Nor did the prosecutor present evidence of any of the studies Breland was apparently relying on so that counsel could meet this testimony with his own expert. And the same was true for the testimony about vaginal injury. There is no question that Breland had experience and could testify based upon that without further foundation. See Jones, 71 Wn. App. at 798. But even where one has such experience, for example the CPS worker in Jones, testimony from such a witness still “must be based upon a scientific principle or explanatory theory that has gained general acceptance in the scientific community.” Id. There was no evidence that the claims Breland was making met that standard and the prosecution failed to establish sufficient foundation for this “expert” testimony.

Most troubling, the failure to subject these “opinions” to any

scientific rigor or scrutiny occurred at the same time that they were given the gloss of coming from an “expert.” Again, there is a distinction between “a caseworker narrowly testifying to the behavior of abused children seen in a specific practice” and more generalized assertions of results as to abused children as a class. Jones, 71 Wn. App. at 817-18. And again, where, as here, the witness makes “generalized statements” about injuries abused children suffer as a class, “the testimony crosses over to scientific testimony” and the proper foundation must be laid. Id. The prosecutor failed to establish that foundation and the court therefore abused its discretion in admitting this highly important, unsupported evidence. This Court should so hold.

c. Improper opinions of Reed-Lyyski

The prosecutor was also allowed to further exacerbate the violations to Ryan’s rights by admitting subsequent improper opinion.

i. Relevant facts

Prior to rebuttal testimony of Reed-Lyyski, the CPS social worker, Ryan moved to preclude her from saying that she “has a special position where she handles high-profile cases, sexual assault cases and high-risk physical abuse cases.” RP 541. Counsel argued that these statements would be “improper and inflammatory” and create a “special aura” to the testimony. RP 1541. The court overruled the objection. RP 1541.

Reed-Lyyski then testified that she was only assigned “specific cases” which were “[h]igh-profile cases, sexual assault against children, and high-risk physical abuse.” RP 1544. She then talked about being assigned to this case. RP 1544, 1546.

Reed-Lyyski also testified about doing her “own investigation” for CPS. RP 1546. After telling the jury that Denni had been under suspicion for neglecting her children, Reed-Lyyski then told them that she had determined that Denni was not guilty of that offense. RP 1564. Denni was under such suspicion when it was believed she had known about the abuse. RP 1564. Reed-Lyyski told jurors she had investigated and concluded that Denni was unaware “of what was happening to her children at that time.” RP 1564, 1567. Reed-Lyyski was also allowed to testify, again over objection, that she had made this determination based on listening to what the girls had said in their “forensic interview.” RP 1568.

ii. Reed-Lyyski gave improper opinion testimony

Once again, the court erred in allowing in testimony which amounted to improper opinion testimony. This time, however, counsel’s objections were not explicitly focused on the testimony being improper “opinion.” Counsel’s objections were that answers were “non-responsive,” called for “hearsay” and a more general “I object.” RP 1564-66. As a result, the comments must be deemed to be explicit or near explicit opinion on guilt, veracity or credibility in order for Ryan to be entitled to relief.

See, e.g., Kirkman, 159 Wn.2d 918, 936-38

Those standards are met in this case because, based on the type of witness involved, the nature of the testimony, the charges and the defense, and the other evidence before the jury, Reed-Lyyski’s testimony amounted to explicit or near explicit improper opinion. Demery, 144 Wn.2d at 759 (quotations omitted). With the testimony, the jury was told that Reed-

Lyyski, a professional child abuse investigator who worked only on “high-profile” child sex abuse cases, had determined that Denni was not neglectful because Denni had not known “what was happening” to her children. Jurors were also told that this professional investigator had the belief that Denni had not known what was happening, and that the belief and Reed-Lyyski’s determination that Denni was not neglectful were based upon what the girls had said in their forensic interviews. RP 1564.

It is difficult to conceive how this testimony could be seen as anything less than an implicit but clear declaration by the CPS investigator of her opinion that what the children were claiming had happened had, in fact, occurred. RP 1564. The testimony told the jury that the investigator had *investigated* the issue. And Reed-Lyyski could not have made the determination that Denni Nelson was not “neglectful” in failing to know about the abuse unless Reed-Lyyski had concluded the abuse had occurred. Otherwise, Reed-Lyyski’s finding would have been that mom did not know about what the girls claimed occurred because it simply had not happened.

Further, Reed-Lyyski’s testimony also told the jury that this trained investigator had made professional decisions of who had committed neglect based upon what the girls had said in the forensic interview. Thus, Reed-Lyyski’s opinion of the girls’ veracity and credibility was conveyed to the jury, letting them know that she found the forensic interview so reliable and credible that she had relied on it in doing her job.

Indeed, Reed-Lyyski’s opinion that the abuse had occurred was plain in her testimony. She specifically described the question in her investigation of Denni as whether Denni knew what “was happening” to

her children, not whether she knew what was alleged to have happened.

See RP 1565 (emphasis added).

Based upon the Demery factors, these comments were clearly explicit or near explicit improper opinion testimony on credibility, veracity and guilt. See Demery, 144 Wn.2d at 758-59. Again, the testimony came from a government expert, thus likely holding sway. And like the testimony of Arnold-Harms, this testimony went directly to the crucial questions in the case about whether the girls were telling the truth or being coached when they accused Ryan of abuse. The testimony was explicit testimony on the veracity and credibility of the accusers - the state's only evidence against Ryan, and near-explicit testimony on his guilt. This Court should so hold.

d. Reversal is required

Where improper opinion testimony is admitted in violation of the defendant's constitutional rights to trial by jury, reversal is required unless the prosecution can prove the error "harmless" by showing, beyond a reasonable doubt, that every reasonable jury would have reached the same result, absent the error. State v. Guloy, 104 Wn.2d 412, 425, 705 P.2d 1182 (1985), cert. denied, 475 U.S. 1020 (1986). That standard is only met if the untainted evidence was so overwhelming that it "necessarily" leads to a finding of guilt. 104 Wn.2d at 425.

Here, the prosecution cannot meet that burden. As a threshold matter, it is important to note that this Court uses a different standard and test for review of this issue than those employed when the issue on review is the sufficiency of the evidence to support a conviction. Where the

question is sufficiency of the evidence, this Court uses a relatively deferential standard, looking to see if the evidence, taken in the light most favorable to the state, would be enough for *any* rational fact-finder to convict. State v. Green, 94 Wn.2d 216, 221, 616 P.2d 628 (1980), overruled in part and on other grounds by Washington v. Recuenco, 548 U.S. 212, 126 S. Ct. 2546, 165 L. Ed. 2d 466 (2006). The burden is on the defendant to prove that the evidence was so deficient that no reasonable fact-finder could have made the required findings below. See, e.g., State v. Eckenrode, 159 Wn.2d 488, 496, 150 P.3d 1116 (2007).

In stark contrast, to prove a constitutional error “harmless,” the prosecution bears the burden of showing that *every* reasonable fact-finder would have convicted even if the error had not occurred. Easter, 130 Wn.2d at 242. Indeed, constitutional error is presumed prejudicial. Id. Rather than being deferential, the standard for constitutional harmless error, the “overwhelming evidence” test, requires the Court to reverse unless it is convinced beyond a reasonable doubt that the constitutional error could not have had *any* effect on the fact-finder’s decision to convict. Easter, 130 Wn.2d at 242.

Thus, even when there is enough evidence to uphold a conviction against a “sufficiency of the evidence” challenge, that is not enough to meet the “overwhelming evidence” test. See, e.g., Romero, 113 Wn. App. at 783-85 (evidence found sufficient to uphold the conviction was insufficient to meet the “overwhelming evidence” test). Even where there is significant evidence of guilt, where there are issues of credibility and evidence is disputed, the jury is presented “with a credibility contest” and constitutional

error such as improper opinion testimony cannot be said to be “harmless.” Id. Put another way, when the jury is faced with having to make a credibility determination, it is not likely the state can show that every single jury faced with such a decision would still have reached the same conclusion absent the constitutional error, i.e., could not possibly have been swayed by whatever evidence that error allowed.

Here, there is no way the state can meet its burden of proving that the improper opinion testimony of Arnold-Harms and Reed-Lyyski was “harmless” beyond a reasonable doubt under the constitutional harmless error standard. Those opinions went directly to the heart of the state’s case against Ryan and bolstered the credibility and veracity of the sole witnesses against him.

Further, there was absolutely no physical evidence to support the convictions - no medical evidence, no trace evidence, no bruises, no healing injuries, no hymenal injury or even diminution, no anal injuries whether old or new - nothing other than the girls’ claims to support the convictions. And the credibility and veracity of the girls was very much at issue in this case, especially given their admissions of having lied before to get people in trouble (RP 520, 620-22), having gotten in trouble for lying to school officials (RP 520, 520-22), and, most disturbing, having lied about being sexually abused by a man other than Ryan (RP 802-803).

In addition, the improper admission of the “expert” testimony supports reversal. While the court’s decision to admit expert testimony is generally reviewed for abuse of discretion, here there is more than a reasonable probability that the “expert” testimony affected the verdict,

given the lack of supporting evidence for the convictions. This “expert” testimony all went to the crucial issues in the case: whether the girls had been coached and how to explain the lack of any medical evidence whatsoever.

The prosecution cannot prove the constitutional errors “harmless.” Reversal and remand of the counts remaining after the dismissals mandated under argument 1, *infra*, is required.

4. THE COURT ERRED IN ADMITTING HEARSAY FROM THERAPISTS WHICH WAS INADMISSIBLE UNDER ER 803(A)(4) AND ER 801(D)(1)

The trial court also erred in admitting statements from Breland, Mulligan and Harris about what the girls told them, because those statements were not admissible under the hearsay exception for statements made for “purposes of medical diagnosis or treatment” under ER 803(a)(4) and was not admissible to “rebut” a claim of “recent fabrication” under ER ER 801(d)(1).

a. Relevant facts

Before Breland, the pediatric nurse practitioner, testified, counsel moved to prevent any mention of declarations Ca had made during Breland’s examination, arguing that those statements did not meet the requirements for the hearsay exception for medical treatment and diagnosis because there was no evidence that the child understood she was there for such purposes. RP 398. The court allowed the testimony with one small exclusion, stating the statements were “consistent with a medical exam.” RP 400-401.

At trial, Breland testified about Ca saying she was missing her

mom, pointing to her genital and bottom areas when asked if Ryan had done something that “hurt her body,” saying she had “[b]leeding” and reporting that it was “[w]here I go number two, and it hurt to go poop and sometimes it stings when I go pee.” RP 439-41.

Counsel also objected that the two therapists, Phoebe Mulligan and Carlin Harris, should not be allowed to present testimony about what Co and Ca said to them, because it was not admissible under ER 803(a)(4). RP 767, 806-807, 834-36. The court allowed the testimony. Harris told jurors that Co had said that 1) she had gotten “hurt” by her mom’s boyfriend, 2) she had bad dreams and nightmares, 3) she was concerned Ryan might come and find her because she told, 4) she had dreams about Ryan hurting her and her family, 5) one of those dreams involves him lining the girls and her mom up and shooting them “like Al Capone” because they “told” and then dumping her body in the water, 6) another dream involves him causing her to drown, 7) she was anxious about seeing Ryan in person at the trial, 8) she had a “fear” of that and had a particular strategy “not to look at him,” and 9) that the “hurting” had happened in the vaginal area using both hands and penis. RP 859-64.

Harris was also allowed to testify that Ca said 1) “[h]e scares me and he comes to get me,” 2) Ryan was “putting his body on us,” 3) Ca was having physical trouble sleeping, bad dreams, nightmares, scary thoughts during the day and did not trust people and feared they would hurt her, 4) Ca thought it was “normal” to do the “hurting,” 5) she reported flashbacks where her body hurt, 6) that she thought her mom did not want to be with them, 7) that she felt “sick” whenever she thinks of Ryan and the trial and

8) that she had “[f]ear” of seeing Ryan’s face but that she was not going to look at him because “she’s the boss of her eyes.” RP 859-69.

In closing argument, the prosecutor relied on this testimony from Harris. Breland and Mulligan repeatedly. RP 1169-55, 1658-62, 1664-65.

b. The evidence was inadmissible hearsay

The court erred in admitting these statements. First, the statements were not admissible as statements made for “purposes of medical diagnosis or treatment” under ER 803(a)(4). The rule provides for admission of:

Statements made for purposes of medical diagnosis or treatment and describing medical history, or part 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.

While statements to a therapist may qualify for admission under that rule, a certain foundation is required. See e.g., In re Dependency of M.P., 76 Wn. App. 87, 92-94, 882 P.2d 1180 (1994), review denied, 126 Wn.2d 1012 (1995). First, the “declarant’s motive in making the statement must be consistent with the purposes of promoting treatment.” State v. Carol M.D. and Mark A.D., 89 Wn. App. 77, 85, 948 P.2d 837 (1998), quoting, United States v. Renville, 779 F.2d 430, 437-38 (8<sup>th</sup> Cir. 1985). Second, the “content of the statement” must be something as is “reasonably relied” on in treatment or diagnosis. Carol M.D., 89 Wn. App. at 85. The theory behind admissibility of statements made for a “medical purpose” is that the declarant “has a strong motive to speak truthfully and accurately because his successful treatment depends upon it.” Carol M.D., 89 Wn. App. at 85. It is “this strong self-interest” that makes the “medical purposes” exception “firmly rooted.” Id.

To prove that the proper motive existed, courts have been willing to assume that the declarant had the required self-interest to speak truthfully when, for example, the child was almost 11 at the time of the statements and those statements were made at a hospital. See State v. Kilgore, 107 Wn. App. 160, 182-83, 26 P.3d 208 (2001), affirmed, 147 Wn.2d 288, 53 P.3d 974 (2002). In contrast, where the child treatment in question is talking to counselors procured by a state agency, “the State’s burden is more onerous” and the record must “affirmatively demonstrate that the child made the statements understanding that they would further the diagnosis and possible treatment of the child’s condition.” Carol M.D., 89 Wn. App. at 86 (emphasis in original). In M.D., there was no such demonstration because the child did not know what the therapist was supposed to do and the therapist never testified that she had explained to the child that “successful treatment depended upon her providing truthful and accurate information about what had happened to her.” Id. The Carol M.D. Court refused to “assume,” under the circumstances, that the nine-year old “was motivated to tell the truth by her self-interest in obtaining proper medical treatment,” without affirmative evidence to prove that motivation. Id.

Here, there was no testimony from Mulligan, Harris or Breland that they had explained to Co or Ca that it was important for them to tell the truth because their own recovery depended upon it. Ca, who was eight years old at the time, said she was seeing Breland “because my dad told me.” RP 196, 202. Breland herself questioned whether that showed that Ca understood she was there for “medical treatment and examination,”

although Breland thought Ca seemed to have a more “clear understanding” once Ca’s aunt was there. RP 202. For Mulligan, Ca said she went to see “Miss Phoebe” because “Sean was hurting us,” and for Mulligan and Harris, when asked what their jobs were, Ca answered with a question, “[t]o make us feel better?” RP 581-83. About Harris and Mulligan, Co said they both “wanted to see if I was emotionally healthy,” that they were people she could express her feelings to and talk to about “what happened,” that Mulligan helped her with “issues” and that Harris is someone she can trust and “talk openly” with, who helps her address her feelings. RP 665-67.

Other testimony about what the girls might have known came from Sam, who said he told the girls the purpose of going to Harris was to help them “work through these hard times,” and from Breland, who said she asked kids in general “why do they think they are there.” RP 501-502.

But Breland, Harris and Mulligan never testified about establishing with either girl that they needed to tell the truth in order to get the treatment they needed. And nothing in the other testimony “affirmatively demonstrates” such awareness on the part of the girls.

Further, Harris admitted using play therapy with the girls, *encouraging* them to make up stories using dolls and other things as part of the therapy. RP 832. Such therapy may have a therapeutic purpose but it hardly ensures truthful answers are given. And allowing such fantasizing for part of the treatment process casts even further doubt on the admissibility of the evidence under the “medical treatment” exception. That is why having the proper foundation of “self interest” is so important.

Because there was no affirmative demonstration that the two girls knew they had to tell the truth to Breland, Harris and Mulligan for their own well-being, the state failed to establish that the girls had the required “strong motive” to tell the truth in those sessions and the evidence was inadmissible under the “medical purposes” exception.

Nor was it admissible to rebut a claim of “recent fabrication.” Under ER 801(d)(1), where a witness makes statements prior to there being a motive for fabrication, those “prior consistent” statements are admissible to rebut the claim that the declarant acted on the later motive and subsequent statements were fabrication. See State v. Harper, 35 Wn. App. 855, 857, 670 P.2d 296 (1983), review denied, 100 Wn.2d 1035 (1984). But statements by a counselor showing that a child made consistent statements *after* the motive for fabrication had arisen do not rebut a claim of recent fabrication. Id. Here, the motive for fabrication was from day one of the allegations. And there was no claim here of “recent fabrication.” Evidence that the girls had always made consistent disclosures was not admissible without such a claim. Evidence that their subsequent disclosures were consistent was not admissible under ER 801(d)(1).

Reversal is required. Erroneous admission of evidence compels reversal if there is a reasonable probability that it affected the verdict. State v. Neal, 144 Wn.2d 600, 611, 30 P.3d 1255 (2001). There is more than such a reasonable probability here. Much of the evidence improperly admitted came from no other source. Mulligan’s was the only testimony about the girls wanting to “hurt themselves” - something the prosecutor implied proved they had been abused. See RP 1025-28, 1659. Mulligan

was also the source of the declarations of Ca that she just wanted to go to sleep at night knowing she was safe. See RP 1659-60. And while there was some other testimony about nightmares, only Harris raised the specter of the fear of being shot and killed by Ryan and that Ryan would drown them if they told - relied on in closing. See RP 1633-65. Only Harris said “Sean scares me” - another comment used to argue guilt. See RP 1651.

Further, the other testimony provided cumulative repetition of the claims against Ryan and gave them the veneer of being said over and over, as if they came from different sources instead of just from Ca and Co.

Again, it must be remembered that the only evidence against Ryan was the word of the girls. There was no medical evidence. There was no physical evidence. There was no testimony from anyone talking about consistent, contemporaneous accusations. There was instead the complete absence of any indicators of trauma or issues at the relevant time. The improperly admitted evidence not only bolstered the girls’ claims by force of repetition but also added the dimension of “fear” which could easily have swayed the jury to convict despite the weakness of the state’s evidence. Reversal and remand for retrial of the counts remaining after the dismissal of the two counts of first-degree child rape as argued, *infra*, in argument 1, is required.

5. THE SENTENCING COURT ERRED IN ORDERING  
IMPROPER CONDITIONS OF COMMUNITY CUSTODY

The sentencing court further erred in imposing several of the conditions of community placement/custody. As a threshold matter, these issues are properly before the Court. Where the lower court imposes an

illegal or erroneous condition, that issue may be raised for the first time on appeal. State v. Bahl, 164 Wn.2d 739, 744-46, 193 P.3d 678 (2008).

Further, a challenge to such a condition may be made “preenforcement” if the challenge raises primarily a legal question and no further factual development is required. Id.

The conditions in this case meet those standards. The relevant conditions were contained in the judgment and sentence, Appendix F, and in a separate Appendix H. See CP 231; App. C. Those conditions were as follows:

a) to not “peruse or possess porn as defined by the CCO in consultation with others, b) to have no access to the Internet without “childblocks,” c) to get chemical dependency evaluation and comply with treatment, d) to get a mental health evaluation and comply with treatment, including medication, e) to “submit to affirmative acts necessary to monitor compliance with court orders as required by DOC,” f) to “participate in crime-related treatment or counseling,” and g) to “comply with any crime-related prohibitions.”

CP 231; App. C.

All of these conditions were improper. A sentencing court is limited to imposing only those conditions which are authorized by statute. See State v. Zimmer, 146 Wn. App. 405, 414, 190 P.3d 121 (2008), review denied, 165 Wn.2d 1035 (2009). Further, the due process rights guaranteed under the state and federal constitutions prohibit imposition of conditions which are unconstitutionally vague. See State v. Sansone, 127 Wn. App. 630, 638, 111 P.3d 1251 (2005). A condition is vague and in violation of due process if it either is not defined with sufficient definiteness so that an ordinary person could discern what conduct was prohibited or if it “does not provide ascertainable standards of guilt to protect against arbitrary

enforcement.” Sansone, 127 Wn. App. at 639, citing, Spokane v. Douglass, 115 Wn.2d 171, 182, 795 P.2d 693 (1990). In addition, where a condition infringes upon First Amendment rights, it must meet greater requirements for specificity. 164 Wn.2d at 757-58.

Condition a) did not meet those requirements. That condition provides:

Do not peruse or possess pornographic materials. Your Community Corrections Officer will consult with the identified Sexual Deviancy Treatment Provider to define pornographic material.

App. C. This condition fails to define the prohibited conduct sufficiently and fails to provide ascertainable standards to prohibit arbitrary or discriminatory enforcement. Bahl, supra, controls. In Bahl, the relevant condition mandated that Bahl refrain from “possess[ing] or access[ing] pornographic materials, as directed by the supervising Community Corrections Officer.” 164 Wn.2d at 754. The Supreme Court found the condition unconstitutionally vague, declaring “[t]he fact that the condition provides that Bahl’s community corrections officer can direct what falls within the condition only makes the vagueness problem more apparent,” because, with that language, the condition “virtually acknowledges on its face [that] it does not provide ascertainable standards for enforcement.” 164 Wn.2d at 758; see also Sansone, 127 Wn. App. at 639 (prohibition on “pornography” unconstitutionally vague because it was not “defined with sufficient definiteness such that ordinary people can understand what it encompasses”).

As in Bahl and Sansone, the condition here fails to define what is prohibited and fails to provide ascertainable standards for enforcement,

because it prohibits “pornography,” a term which the court then left wholly undefined. Further, just as in Bahl and Sansone, the delegation of the definition to DOC makes clear just how vague the condition is. And the condition infringes upon Ryan’s First Amendment rights without being “clear . . . and. . . reasonably necessary to accomplish essential state needs and public order.” See Bahl, 164 Wn.2d at 758.

Conditions e), f) and g) are also in violation of Ryan’s due process rights. Condition e) required Ryan to “submit to affirmative acts necessary to monitor compliance with court orders as required by DOC.” CP 231. Condition f) required him to “participate in crime-related treatment or counseling services” and condition g) similarly required him “to comply with any crime-related prohibitions.” CP 231.

None of these conditions adequately define the prohibited conduct sufficiently to ensure that Ryan understands what they encompass. Nor do they provide “ascertainable standards” for preventing arbitrary and discriminatory enforcement. Instead, they effectively delegate to DOC the authority to decide not only what “affirmative acts” will be imposed but also what treatment and counseling and prohibitions will apply at some point in the future. The only limitation on the “affirmative acts” is that it must be to monitor court orders, and the only limitation on the counseling/treatment and prohibitions is that they must be “crime-related.” CP 231.

These limits, however, do not change the fact that the sentencing court abdicated its responsibility for deciding what affirmative acts, counseling/treatment and prohibitions were proper in this case. But while a

sentencing court may delegate certain administrative tasks to DOC, it is not permitted to delegate its authority in a way which “abdicates its judicial responsibility” for setting the terms of community custody. Sansone, 127 Wn. App. at 642. Instead, it is the court’s responsibility to set forth those conditions in the judgment and sentence, leaving to DOC to handle monitoring and enforcement. Former RCW 9.94A.700(5)<sup>7</sup> provides the court with the authority - and the responsibility - to decide which conditions were proper and order those conditions.

The delegation of the authority to define what is prohibited to the CCO was especially improper in condition a), because it creates “a real danger that the prohibition on pornography may ultimately translate to a prohibition on whatever the officer personally finds” to be so - even if it is not, legally, pornography. See Sansone, 127 Wn. App. at 641-42, quoting, United States v. Guagliardo, 278 F.3d 868, 872 (9<sup>th</sup> Cir.), cert. denied, 537 U.S. 1004 (2002) (citations omitted).

The improper delegation of judicial authority to DOC is also offensive to the role and function of this Court and Ryan’s constitutional right to a meaningful appeal. Ryan’s right to appeal from the judgment and sentence is effective now, after imposition of the sentence. See, e.g., State v. Sweet, 90 Wn.2d 282, 287, 581 P.2d 579 (1978); Art. I, § 22. It is now that the conditions of community supervision are subjected to the scrutiny of this Court to determine whether they are legally proper. Notably, the appellate courts have repeatedly had to address the propriety of certain

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<sup>7</sup>This statute was renumbered effective August 1, 2009, as RCW 9.94B.050. See Laws of 2008, ch. 231, § 56.

conditions and whether they are “crime-related,” as even trial courts themselves have been known to overreach in impose improper conditions. See, e.g., Zimmer, 146 Wn. App. at 413. The delegation of judicial authority under conditions a), e), f) and g) was wholly improper.

In addition, condition a) and conditions b), c) and d) were not statutorily authorized. Conditions b), c) and d) were to have no access to the Internet without “childblocks,” to get a chemical dependency evaluation and comply with treatment, and a similar condition for mental health. App. C. The relevant statutes start with former RCW 9.94A.712<sup>8</sup>, which governed the sentencing of sex offenses not involving a persistent offender allegation. Under that statute, the sentencing court was permitted to impose conditions set forth in former RCW 9.94A.700(5)(2007)<sup>9</sup>. That statute provided, in relevant part, that the court could order that “[t]he offender shall comply with any crime-related prohibitions.” Former RCW 9.94A.700(5)(e). Former RCW 9.94A.700(5)(c) also gave the court authority to order affirmative conduct i.e., that “[t]he offender shall participate in crime-related treatment or counseling services.”

But the prohibitions contained in conditions a) and b) were not “crime-related.” To meet that standard, a prohibition must forbid conduct that “directly relates to the circumstances of the crime.” State v. Autrey, 136 Wn. App. 460, 466, 150 P.3d 580 (2006). Thus, in Zimmer, when the

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<sup>8</sup>This statute was renumbered effective August 1, 2009, as RCW 9.94A.507. See Laws of 2008, ch. 231, § 56.

<sup>9</sup>This statute was renumbered effective August 1, 2009, as RCW 9.94B.050. See Laws of 2008, ch. 231, § 56.

defendant possessed drugs and paraphernalia and was convicted of drug possession, a condition prohibiting possession of paraphernalia was sufficiently “crime-related.” 146 Wn. App. at 413. In contrast, a condition prohibiting the defendant from possessing or using certain communications technologies was not “crime-related,” despite the sentencing court’s apparent belief that such devices “can be used to facilitate the sale or transfer of controlled substances[.]” 146 Wn. App. at 411-12. This Court held that the prohibition was not “crime-related” even though some defendants may use those items in criminal activity, because there was no evidence that the defendant had so used them in the case. 146 Wn. App. at 414.

Similarly, here, there was no evidence that possession or viewing of pornography or access to the internet was in any way related to any of the crimes. Regardless whether some other defendant might use such materials in committing similar crimes, because of the lack of evidence of such use here, conditions a) and b) were not “crime-related.”

Nor were conditions c) and d). Condition c) required a chemical dependency evaluation/treatment, and condition d) was for mental health evaluation/treatment. App. C. Under former RCW 9.94A.700(5)(c), such affirmative conduct may only be ordered if it is “crime-related treatment or counseling.” But there was no evidence that chemical dependency or mental illness was in any way involved in these crimes.

Further, condition d) runs afoul of former RCW 9.94A.505(9)<sup>10</sup>.

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<sup>10</sup>This provision was removed from the statute in 2008. See Laws of 2008, ch. 231, § 25.

That statute provided authority to order a mental health evaluation and participation in outpatient mental health treatment only “if the court finds that reasonable grounds exist to believe that the offender is a mentally ill person as defined in RCW 71.24.035, and that this condition is likely to have influenced the offense.” Former RCW 9.94A.505(9). In addition, any such condition must be “based upon a presentence report and, if applicable, mental status evaluations that have been filed with the court to determine the offender’s competency or eligibility for a defense of insanity.” Id.; see State v. Jones, 118 Wn. App. 199, 209, 76 P.3d 258 (2003). The sentencing court here made no finding of “reasonable grounds” to believe Ryan was mentally ill and that this illness “influenced the offense.” Nor did the court rely upon any mental status evaluations or the presentence reports regarding mental illness. The only issues were raised later, as a result of Ryan’s unsuccessful suicide attempt post-conviction. See, e.g., CP 213-15, 239-41, 278-81. As a result, the court erred in ordering mental health treatment and counseling which was not statutorily authorized and “without following statutory prerequisites.” Jones, 118 Wn. App. at 209.

Finally, neither condition was authorized by former RCW 9.94A.715(2)(b),<sup>11</sup> which allowed ordering participation in rehabilitative programs or engaging in affirmative conduct “reasonably related to the circumstances of the offense, the offender’s risk of reoffending, or the safety of the community.” Rehabilitative programs and/or affirmative

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<sup>11</sup>This statute was repealed in 2008 and 2009. See Laws of 2008, ch. 231, § 57; Laws of 2009, ch. 28, § 42.

conduct under that statute are only “reasonably related” to the circumstances of the offense if evidence shows that the problem for which the programs or conduct are being ordered contributed to the offense. Jones, 118 Wn. App. at 208. Again, there was nothing in the record here indicating that Ryan had mental illness or chemical dependency issues which had influenced or caused the offenses. Even if any or all of the convictions could somehow be affirmed, this Court should strike these improper conditions.

E. CONCLUSION

For the reasons stated herein, reversal and dismissal of two of the counts of first-degree child rape is required. Further, remand for a new trial is required for the remaining counts and, should further convictions be imposed, the improper conditions of community custody should not.

DATED this 8<sup>th</sup> day of January, 2011.

Respectfully submitted,



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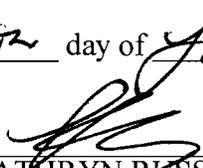
CERTIFICATE OF SERVICE BY MAIL

Under penalty of perjury under the laws of the State of Washington, I hereby declare that I sent a true and correct copy of the attached Appellant's Opening Brief to opposing counsel and to appellant by depositing the same in the United States Mail, first class postage pre-paid, as follows:

to Ms. Kathleen Proctor, Esq., Pierce County Prosecutor's Office, 946 County City Building, 930 Tacoma Ave. S., Tacoma, WA. 98402;

to Mr. Sean P. Ryan, DOC 318430, MCC, PO Box 777, Monroe, WA. 98272.

DATED this 8<sup>th</sup> day of January, 2011.



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STATE OF WASHINGTON  
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DEPUTY  
COURT REPORTERS  
DIVISION II

# Appendix A

The verbatim report of proceeding consists of 15 volumes, which will be referred to as follows:

the proceedings of February 28 and April 1, 2008, as “1RP;”

the proceedings of April 10-11, 2008, as “2RP;”

the 11 chronologically paginated volumes containing the proceedings of April 14-17, 21-23 and 30, May 1, 5-7 and 12, 2008 and November 6, 2009, as “RP;”

the proceedings of June 4, 2009, as “3RP;” and

the proceedings of September 14 and 30, 2009, as “4RP.”

# APPENDIX B

INSTRUCTION NO. 1

The State alleges that the defendant committed acts of rape of a child in the first degree on multiple occasions. To convict the defendant on any count of rape of a child in the first degree, one particular act of rape of child in the first degree must be proved beyond a reasonable doubt and you must unanimously agree as to which act has been proved. You need not unanimously agree that the defendant committed all the acts of rape of a child in the first degree.

INSTRUCTION NO. 8

To convict the defendant of the crime of rape of a child in the first degree, as charged in count I, each of the following elements of the crime must be proved beyond a reasonable doubt:

- (1) That on or about the period between the 2<sup>nd</sup> day of February, 2004 and the 27<sup>th</sup> day of July 2007, the defendant had sexual intercourse with Ca. N.;
- (2) That Ca. N. was less than twelve years old at the time of the sexual intercourse and was not married to the defendant;
- (3) That the defendant was at least twenty-four months older than Ca. N.; and
- (4) That the acts occurred in the State of Washington.

If you find from the evidence that each of these elements has been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty.

On the other hand, if, after weighing all the evidence you have a reasonable doubt as to any one of these elements, then it will be your duty to return a verdict of not guilty.

INSTRUCTION NO. 9

To convict the defendant of the crime of rape of a child in the first degree, as charged in count II, each of the following elements of the crime must be proved beyond a reasonable doubt:

- (1) That on or about the the period between the 2<sup>nd</sup> day of February, 2004 and the 27<sup>th</sup> day of July, 2007, the defendant had sexual intercourse with Ca. N.;
- (2) That Ca. N. was less than twelve years old at the time of the sexual intercourse and was not married to the defendant;
- (3) That the defendant was at least twenty-four months older than Ca. N.; and
- (4) That the acts occurred in the State of Washington.

If you find from the evidence that each of these elements has been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty.

On the other hand, if, after weighing all the evidence you have a reasonable doubt as to any one of these elements, then it will be your duty to return a verdict of not guilty.

INSTRUCTION NO. 10

To convict the defendant of the crime of rape of a child in the first degree, as charged in count III, each of the following elements of the crime must be proved beyond a reasonable doubt:

(1) That on or about the period between the 2nd day of February, 2004 and the 27<sup>th</sup> day of July, 2007, the defendant had sexual intercourse with Ca. N.;

(2) That Ca. N. was less than twelve years old at the time of the sexual intercourse and was not married to the defendant;

(3) That the defendant was at least twenty-four months older than Ca. N.; and

(4) That the acts occurred in the State of Washington.

If you find from the evidence that each of these elements has been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty.

On the other hand, if, after weighing all the evidence you have a reasonable doubt as to any one of these elements, then it will be your duty to return a verdict of not guilty.

INSTRUCTION NO. 11

To convict the defendant of the crime of rape of a child in the first degree, as charged in count IV, each of the following elements of the crime must be proved beyond a reasonable doubt:

(1) That on or about the period between the 2nd day of February, 2004, and the 27<sup>th</sup> day of July, 2007, the defendant had sexual intercourse with Ca. N.;

(2) That Ca. N. was less than twelve years old at the time of the sexual intercourse and was not married to the defendant;

(3) That the defendant was at least twenty-four months older than Ca. N.; and

(4) That the acts occurred in the State of Washington.

If you find from the evidence that each of these elements has been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty.

On the other hand, if, after weighing all the evidence you have a reasonable doubt as to any one of these elements, then it will be your duty to return a verdict of not guilty.

INSTRUCTION NO. 13

The State alleges that the defendant committed acts of rape of a child in the second degree on multiple occasions. To convict the defendant on any count of rape of a child in the second degree, one particular act <sup>of</sup> rape of a child in the second degree must be proved beyond a reasonable doubt and you must unanimously agree as to which act has been proved. You need not unanimously agree that the defendant committed all the acts of rape of a child in the second degree.

# APPENDIX C

APPENDIX "F"

The defendant having been sentenced to the Department of Corrections for a:

- X   sex offense
- serious violent offense
- assault in the second degree
- any crime where the defendant or an accomplice was armed with a deadly weapon
- any felony under 69.50 and 69.52

The offender shall report to and be available for contact with the assigned community corrections officer as directed:

The offender shall work at Department of Corrections approved education, employment, and/or community service;

The offender shall not consume controlled substances except pursuant to lawfully issued prescriptions;

An offender in community custody shall not unlawfully possess controlled substances;

The offender shall pay community placement fees as determined by DOC:

The residence location and living arrangements are subject to the prior approval of the department of corrections during the period of community placement.

The offender shall submit to affirmative acts necessary to monitor compliance with court orders as required by DOC.

The Court may also order any of the following special conditions:

       (I) The offender shall remain within, or outside of, a specified geographical boundary: \_\_\_\_\_

  K   (II) The offender shall not have direct or indirect contact with the victim of the crime or a specified class of individuals: see attached orders prohibiting contact

  K   (III) The offender shall participate in crime-related treatment or counseling services;

       (IV) The offender shall not consume alcohol; \_\_\_\_\_

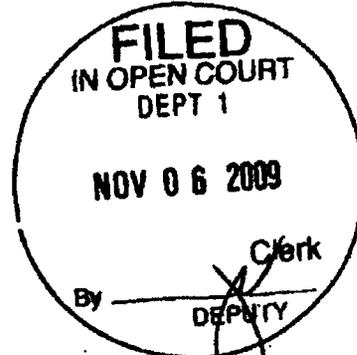
  K   (V) The residence location and living arrangements of a sex offender shall be subject to the prior approval of the department of corrections; or

  X   (VI) The offender shall comply with any crime-related prohibitions.

       (VII) Other: \_\_\_\_\_



07-1-04102-0 33158310 APXH 11-09-09



IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON  
IN AND FOR THE COUNTY OF PIERCE

STATE OF WASHINGTON	]	Cause No.: 07-1-04102-0
	]	
Plaintiff	]	JUDGEMENT AND SENTENCE (FELONY)
v.	]	APPENDIX H
Sean Patrick Ryan	]	COMMUNITY PLACEMENT / CUSTODY <sup>Nov</sup> 9 2009
Defendant	]	
	]	
DOC No. 318430	]	

The court having found the defendant guilty of offense(s) qualifying for Community Custody, it is further ordered as set forth below.

**COMMUNITY PLACEMENT/CUSTODY:** Defendant additionally is sentenced on convictions herein, for the offenses under RCW 9.94A.712 committed on or after September 1, 2001 to include up to life community custody; for each sex offense and serious violent offense committed on or after June 6, 1996 to Community Placement/Custody for three years or up to the period of earned early release awarded pursuant to RCW 9.94A.150 (1) and (2) whichever is longer, and on conviction herein for an offense categorized as a sex offense or serious violent offense committed on or after July 1, 1990, but before June 6, 1996, to community placement for two years or up to the period of earned release awarded pursuant to RCW 9.94A.150 (1) and (2) whichever is longer, and on conviction herein for an offense categorized as a sex offense or a serious violent offense committed after July 1, 1988, but before July 1, 1990, assault in the second degree, any crime against a person where it is determined in accordance with RCW 9.94A.125 that the defendant or an accomplice was armed with a deadly weapon at the time of commission, or any felony under chapter 69.50 or 69.52 RCW, committed on or after July 1, 1988, to a one-year term of community placement. Community Placement/Custody is to begin either upon completion of the term of confinement or at such time as the defendant is transferred to Community Custody in lieu of early release.

(a) **MANDATORY CONDITIONS:** Defendant shall comply with the following conditions during the term of community placement/custody:

- (1) Report to and be available for contact with the assigned Community Corrections Officer as directed;
- (2) Work at a Department of Corrections' approved education, employment, and/or community service site;
- (3) Do not consume alcohol or controlled substances except pursuant to lawfully issued prescriptions;
- (4) Do not unlawfully possess controlled substances;
- (5) Pay supervision fees as determined by the Department of Corrections;
- (6) Receive prior approval for living arrangements and residence location;
- (7) Defendant shall not own, use, or possess a firearm or ammunition when sentenced to community service, community supervision, or both (RCW 9.94A, 120 (13));
- (8) Notify Community Corrections Officer of any change in address or employment; and
- (9) Remain within geographic boundary, as set fourth in writing by the Community Corrections Officer.

**WAIVER:** The following above-listed mandatory conditions are waived by the Court: None

(b) **OTHER CONDITIONS:** Defendant shall comply with the following other conditions during the term of community placement / custody:

10. Reside at a residence and under living arrangements approved of in advance by your Community Corrections Officer. You shall not change your residence without first obtaining the authorization of you Community Corrections Officer.
11. Obtain a Psychosexual Evaluation and comply with any recommended treatment by a certified Sexual Deviancy Counselor. You are to sign all necessary releases to insure your Community Corrections Officer will be able to monitor your progress in treatment.
12. You shall not change Sexual Deviancy Treatment Providers without prior approval from your Community Corrections Officer.
13. Have no contact with the victims to include but not limited to in-person, written, or third-party.
14. Do not possess or peruse pornographic materials. Your Community Corrections Officer will consult with the identified Sexual Deviancy Treatment Provider to define pornographic material.
15. Hold no position of authority or trust involving children under the age of 18.
16. Do not initiate or prolong physical contact with children under the age of 18 for any reason.
17. Inform your Community Corrections Officer of any romantic relationships to verify there are no victim-age children involved.
18. Submit to polygraph and/or plethysmograph testing as deemed appropriate upon

- direction of your Community Corrections Officer and/or therapist at your expense.
19. Register as a Sex Offender in your county of residence.
  20. Avoid places where children congregate. (Fast-food outlets, libraries, theaters, shopping malls, play grounds and parks.)
  21. Submit to DNA/HIV testing.
  22. Follow all conditions imposed by your Sexual Deviancy Treatment Provider.
  23. Obey all laws.
  24. You shall not have access to the Internet without childblocks in place.
  25. No contact with any minors without prior approval of the DOC/CCO and Sexual Deviancy Treatment Provider.
  26. Obtain a Chemical Dependency Evaluation by a state-certified Drug and Alcohol Counselor and comply with follow-up treatment.
  27. Obtain a Mental Health Evaluation by a state-certified Mental Health Provider and comply with all follow-up treatment to include medications.

11-6-09  
DATE

[Signature]  
JUDGE, PIERCE COUNTY SUPERIOR COURT  
**JAMES ORLANDO**

**FILED**  
IN OPEN COURT  
DEPT 1  
**NOV 06 2009**  
By \_\_\_\_\_ Clerk  
DEPUTY