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COURT OF APPEALS, DIVISION II  
STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

FOREST EVANS GILL, APPELLANT

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CLERK OF COURT OF APPEALS DIV II  
STATE OF WASHINGTON

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Appeal from the Superior Court of Pierce County  
The Honorable Frederick W. Fleming

No. 09-1-01690-1

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**Brief of Respondent**

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A. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR.

1. Was defendant denied the right to a fair trial where the statements made by the State in closing did not constitute prosecutorial misconduct as they did not misstate the burden of proof or shift the burden to defendant and contained proper arguments on the evidence?

2. Did defendant receive constitutionally effective assistance of counsel where defendant cannot show deficient performance or prejudice where counsel was a strong advocate for his client?

3. Should the court remand for resentencing only so that conditions 14, 24, 26 and 27 can be removed from defendant's judgment and sentence?

B. STATEMENT OF THE CASE.

1. Procedure

The State charged defendant, Forest Gill, on March 27, 2009, with three counts of rape of a child in the first degree and one count of child molestation in the first degree. CP 1-2.

The case was called for trial on November 9, 2009. RP 4. A corrected information was filed to correct the date ranges only on the charges. RP 190, CP 40-41. On November 13, 2009, the jury found defendant guilty as charged. RP 235, CP 67-70.

Sentencing was held on January 15, 2010. RP 241, CP 97-110. Defendant's offender score was determined to be a 9. CP 97-110. A Pre-Sentence Investigation (PSI) was presented to the court. CP 84-96. Defendant chose not to participate in the PSI. RP 246, CP 84-96. The court followed the recommendation in the PSI and sentenced defendant to 381 months to life on the three rape counts, and 198 months to life on the child molestation count. RP 249, CP 97-110. The court also incorporated the conditions in Appendix H as part of the sentence. RP 250, CP 97-110, 84-96. Appendix H.

Defendant filed this timely appeal. RP 253-54, CP 113-127.

## 2. Facts

S.R.<sup>1</sup> is a 12-year old girl. RP 19. She lives with her dad and step mom. RP 20. She had visitation, usually on the weekend, with her mom up until Christmas 2008. RP 25, 29. Defendant, Forest Gill, lived with her mom. RP 24.

S.R. related that defendant had touched her in a "bad way" on multiple occasions. RP 31. The first incident happened when she was six at her mom's apartment in Tacoma. RP 32, 76. S.R. was alone with defendant in the apartment. RP 33. Defendant came out of the shower wearing nothing but a towel. RP 32. Defendant sat down on the couch

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<sup>1</sup> As the victim in this case is a minor, the State will refer to her by her initials.

and S.R. was on the floor setting up a game. RP 32-33. Defendant told her to come over to him and when she refused he forced her to come over to him. RP 32. He told her to take off her pants and when she refused that he did it for her. RP 34. Defendant then took off her panties and began to play with her "tutu" with his finger. RP 35. S.R. described her "tutu" as what she uses to pee. RP 36. Defendant stuck his finger inside her body and it hurt her. RP 37. Defendant then took off his towel and told her to suck his penis. RP 37. Defendant rubbed his penis around her crotch and while he stayed on the outside for the most part, he also went inside of her body. RP 38. S.R. described feeling pressure when his penis went inside of her. RP 38. White stuff came out of his penis onto her and the couch. RP 39. Defendant cleaned it up with a towel and told her not to tell or he would get in big trouble. RP 39-40. S.R. was scared to tell because she was afraid her mom would be mad at her. RP 42.

The second incident happened after defendant and her mom moved in with defendant's parents and his brothers and sisters. RP 43. The incident happened in defendant's and her mom's room in the garage. RP 46. Only S.R. and defendant were home. RP 47. S.R. was on the bed watching a movie when defendant came in and took off her pants and underwear. RP 48-49. Defendant touched her crotch with his hand and then used one finger to go inside her once or twice. RP 50. S.R. said she felt pressure when he went inside of her and so she struggled so he couldn't use his penis to go inside her. RP 51. Again, defendant told her

not to tell or he would be in big trouble. RP 52. S.R. didn't tell anyone because she was scared. RP 52-53.

The third time happened at the duplex her mom and defendant lived in. RP 54. She was 11 at the time. RP 54. Defendant came out of the shower wearing only a towel and S.R. was sitting on the couch. RP 57-58. Defendant told her he had only a towel on because it was his house. RP 58. S.R. knew something bad was going to happen. RP 58. Defendant touched her and took off her pants. RP 58. Defendant then took his towel off and touched her private areas. RP 59. Defendant tried to put his penis inside her and it went in partway. RP 60. White stuff came out and went onto her legs. RP 61. Defendant again told her not to tell or he would be in big trouble. RP 61.

The fourth incident happened again at the duplex. RP 61. S.R. was in bed with a headache. RP 62. She then got up to take a bubble bath. RP 63. She shut the door to the bathroom. RP 63. Defendant came in and got into the tub. RP 63. Defendant did not have any clothes on. RP 64. S.R. said she was half asleep and woke up because she hit her head. RP 64. At that time, defendant was playing with her crotch with his penis. RP 64. S.R. could see defendant's penis. RP 65. He stayed on the outside and did not go inside her. RP 65.

S.R. finally disclosed the abuse to her sister L.C.<sup>2</sup> RP 66. Her sister told her they needed to tell her step mom. RP 66. S.R. was in tears when she told her step mom. RP 66. Her step mom told her dad, and her dad called the police. RP 67. She had to talk to the police and see a doctor. RP 68, 70. She said that she finally told so that it wouldn't happen any more. RP 74.

Angela Cayo is S.R.'s step mom. RP 100-01. Toward the end of 2008, Ms Cayo indicated that S.R. no longer wanted to go to her mom's house. RP 104. Defendant came to her and S.R.'s father and encouraged them to get S.R. to come over to his house. RP 105. Defendant said that it shouldn't be up to S.R. if she wanted to come over or not. RP 106. However, S.R.'s dad would not force S.R. to go over there which caused tension between the families. RP 114. Ms. Cayo also indicated that twice when she went to pick up S.R., defendant was the only person home with her. RP 107. Ms. Cayo also said that while S.R. loved her mother, she did tell Ms. Cayo about an incident where her mom put hot sauce up her nose to punish her. RP 73, 113.

Albert Rodrigues is S.R.'s dad. RP 128. S.R. also told him about her mom putting hot sauce up her nose. RP 132-33. S.R.'s mom confirmed that she had done this to S.R. RP 133. Around November or December of 2008, S.R. said she didn't want to go to her mom's. RP 132.

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<sup>2</sup> L.C. is also a minor.

He learned about the abuse right after Christmas and was very angry. RP 134. He indicated that he never would have allowed S.R. to visit defendant's house if he thought anything was going on. RP 148-49.

S.R. indicated that her step mom told her to tell the police the truth but never told her what to say. RP 69. Ms. Cayo confirmed that neither she, nor anyone in the house, told S.R. what to say but that she did tell her to tell the truth. RP 118, 120, 122. S.R. had to go to an interview and a medical exam. RP 119. The interview and exam were about a month apart. RP 119.

Michelle Breland is a pediatric nurse at Mary Bridge Children's Hospital. RP 151. She has been a nurse for 12 years and had done thousands of examinations. RP 153. Ms. Breland examined S.R. on January 27, 2009. RP 156. S.R. knew she was there because of what defendant had done to her. RP 160-61. She also told Ms. Breland that she had been to the same building before to tell a lady what had happened. RP 166. S.R. also told her that defendant had tried to put his privates in hers a couple of times. RP 166. S.R. told her it hurt afterwards. RP 167. S.R. said the last time it happened was in fifth grade. RP 167. Ms. Breland testified that S.R.'s hymen was intact and there were no injuries to her vaginal area. RP 169. However, Ms. Breland testified injuries to the hymen can heal within days. RP 169. The medical exam was consistent

with what S.R. had reported. RP 170. It was also consistent with nothing happening. RP 170.

Michael Lawrence testified for the defense. Mr. Lawrence is defendant's step dad. RP 173. He testified that S.R. enjoyed the visits to their house and didn't want to return to her dad's. RP 177.

Leslie Lawrence also testified for the defense. She is defendant's sister. RP 183. When she would visit, S.R. slept in her room. RP 185. She also testified that S.R. threw a fit whenever she had to go home to her dad's. RP 185. She also claimed that S.R. made up a story about her cousin hitting her in order to get the cousin into trouble. RP 186.

C. ARGUMENT.

1. DEFENDANT WAS NOT DENIED THE RIGHT TO A FAIR TRIAL AS THE STATEMENTS MADE BY THE PROSECUTOR DID NOT CONSTITUTE PROSECUTORIAL MISCONDUCT.

"Trial court rulings based on allegations of prosecutorial misconduct are reviewed under an abuse of discretion standard." *State v. Stenson*, 132 Wn.2d 668, 718, 940 P.2d 1239 (1997). To prove that a prosecutor's actions constitute misconduct, the defendant must show that the prosecutor did not act in good faith and the prosecutor's actions were improper. *State v. Manthie*, 39 Wn. App. 815, 820, 696 P.2d 33 (1985) (citing *State v. Weekly*, 41 Wn.2d 727, 252 P.2d 246 (1952)). The

defendant has the burden of establishing that the alleged misconduct is both improper and prejudicial. *Stenson*, 132 Wn.2d at 718. Even if the defendant proves that the conduct of the prosecutor was improper, the misconduct does not constitute prejudice unless the appellate court determines there is a substantial likelihood the misconduct affected the jury's verdict. *Id.* at 718-19.

A defendant claiming prosecutorial misconduct bears the burden of demonstrating that the remarks or conduct was improper and that it prejudiced the defense. *State v. Gentry*, 125 Wn.2d 570, 640, 888 P.2d 570 (1995) *citing State v. Hoffman*, 116 Wn.2d 51, 93, 804 P.2d 577 (1991). If a curative instruction could have cured the error and the defense failed to request one, then reversal is not required. *State v. Binkin*, 79 Wn. App. 284, 293-294, 902 P.2d 673 (1995), *overruled on other grounds by State v. Kilgore*, 147 Wn.2d 288, 53 P.3d 974 (2002). Failure by the defendant to object to an improper remark constitutes a waiver of that error unless the remark is deemed so "flagrant and ill-intentioned that it evinces an enduring and resulting prejudice that could not have been neutralized by an admonition to the jury." *Stenson*, 132 Wn.2d at 719, *citing Gentry*, 125 Wn.2d at 593-594.

When reviewing an argument that has been challenged as improper, the court should review the context of the whole argument, the issues in the case, the evidence addressed in the argument and the instructions given to the jury. *State v. Russell*, 125 Wn.2d 24, 85-6, 882

P.2d 747 (1994), *citing State v. Graham*, 59 Wn. App. 418, 428, 798 P.2d 314 (1990), *State v. Green*, 46 Wn. App. 92, 96, 730 P.2d 1350 (1986). “Remarks of the prosecutor, even if they are improper, are not grounds for reversal if they were invited or provoked by defense counsel and are in reply to his or her acts and statements, unless the remarks are not a pertinent reply or are so prejudicial that a curative instruction would be ineffective.” *Russell*, 125 Wn.2d at 86, *citing State v. Dennison*, 72 Wn. 2d 842, 849, 435 P.2d 526 (1967). The prosecutor is entitled to make a fair response to the arguments of defense counsel. *Russell*, 125 Wn.2d at 87.

Here, defendant asserts that the prosecutor committed misconduct where he allegedly (a) misstated the burden of proof and (b) shifted the burden to defendant, (c) told the jury that it had to find the State’s witnesses lied in order to acquit, and (d) appealed to the emotion and sympathy of the jury. However, when the State’s arguments are reviewed in context, the State’s arguments were proper arguments based on the court’s instructions and the evidence adduced at trial.

- a. The State’s remarks were proper argument and did not misstate the State’s burden of proof.

A jury is presumed to follow the court’s instructions regarding the proper burden of proof. *State v. Gregory*, 158 Wn.2d 759, 861-2, 147 P.3d 1201 (2006). A jury is presumed to follow the trial court’s

instructions. *State v. Lough*, 125 Wn.2d 847, 864, 889 P.2d 487 (1995).

In that instant case, the court instructed the jury on the law including the reasonable doubt standard and the presumption of innocence.

The defendant has entered a plea of not guilty. That plea puts in issue every element of the crime charged. The State is the plaintiff and has the burden of proving each element of the crime beyond a reasonable doubt. The defendant has no burden of proving that a reasonable doubt exists as to these elements.

A defendant is presumed innocent. This presumption continues throughout the entire trial unless during your deliberations you find it has been overcome by the evidence beyond a reasonable doubt.

A reasonable doubt is one for which a reason exists and may arise from the evidence or lack of evidence. It is such a doubt as would exist in the mind of a reasonable person after fully, fairly, and carefully considering all of the evidence or lack of evidence. If, from such consideration, you have an abiding belief in the truth of the charge, you are satisfied beyond a reasonable doubt.

CP 44-66, Instruction 2, *see also* Washington Pattern Jury Instructions

Criminal, WPIC 4.01. Further, the court instructed the jury:

The lawyer's remarks, statements, and arguments are intended to help you understand the evidence and apply the law. It is important, however, for you to remember that the lawyers' statements are not evidence. The evidence is the testimony and exhibits. The law is contained in my instructions to you. You must disregard any remark, statement, or argument that is not supported by the evidence or the law in my instructions.

CP 44-66, Instruction 1, *see also* Washington Pattern Jury Instructions Criminal, WPIC 1.02. When a court gives an instruction to the jury, the jury is presumed to follow the instruction. *State v. Kroll*, 87 Wn.2d 829, 835, 558 P.2d 173 (1976).

Defendant alleges that the prosecutor misstated the State's burden by arguing that the jury could only consider the evidence from the witness stand and could not consider the lack of evidence. However, appellant mischaracterizes the State's argument. The State referred the jury to instruction number 1, which states:

The evidence that you are to consider during your deliberation consists of the testimony that you have heard from witnesses, stipulations, and the exhibits that I have admitted during trial. If evidence was not admitted or was stricken from the record, then you are not to consider it in reaching your verdict.

CP 45-66, Instruction 1, *see also* Washington Pattern Jury Instructions Criminal, WPIC 1.02. The State's argument focused on the fact that the jury could only consider the evidence it heard from the witness stand and could not consider any evidence that wasn't presented. RP 201-202. That is proper argument based on the jury instruction. The State does not tell the jury that it cannot consider the lack of evidence in terms of finding defendant not guilty. Defendant tries to extend the State's explanation of jury instruction number 1 to be an argument as to the State's burden of proof when the record shows that this argument was in direct relation to

the court's instructions in instruction number 1. The State told the jury that the State had the burden. RP 203. The State also told the jury that if each element was met, then the State had met its burden, but if there was insufficient evidence of any of the elements, then defendant was not guilty. RP 212. The State did not misstate the burden of proof or the jury instructions. There was not error.

Further, defense counsel addressed this issue in his closing. He discussed reasonable doubt and that it could be from the evidence or lack of evidence. RP 217. Defense counsel told the jury it was ok for them to ask themselves where was a certain piece of evidence? RP 217. In response, the State then addressed both reasonable doubt and the evidence the jury was allowed to consider in rebuttal closing by acknowledging the reasonable doubt instruction and clarifying the argument that while they can consider all the evidence or lack of evidence, it doesn't allow the jury to require other evidence they would like to have, since it simply may not exist in this case. RP 226-27. The State emphasized this again when discussing defense counsel's statement that little girls make things up all the time. RP 228. The State pointed out to the jurors that no evidence of this statement was ever presented and so they could not consider that. RP 228. The State's argument, as noted above, was that if the evidence presented was insufficient, then defendant was not guilty but the State further argues that the jury doesn't get to consider evidence that was not admitted or may not even exist. The jury was properly instructed and they

are presumed to follow the law. If the jury felt any of the statements from either counsel was not supported by the court's instructions, then they are deemed to disregard it.

Defendant also alleges that the State misstated the burden of proof by telling the jury that they could find defendant guilty even if they wanted more evidence, that the defendant was not entitled to the benefit of the doubt and that the jury only had to have a belief that this incident happened. Again, defendant mischaracterizes the State's argument. The State referred to jury instruction number 2 about reasonable doubt and stated:

Finally, I want to talk about reasonable doubt, because Mr. Shaw suggests that there's no way that the testimony you heard establishes each of these elements beyond a reasonable doubt. Mr. Shaw read you the third paragraph on Instruction 2, but Mr. Shaw forgot to read you, apparently, the last line of that instruction. I wonder why he did that. Let's read it: "If, from such consideration, you have an abiding belief in the truth of the charge" -- I'll read it again: "You have an abiding belief in the truth of the charge, you are satisfied beyond a reasonable doubt."

What does that mean? Abiding belief means you have a lasting belief in the truth of these charges. Right? That's what it means, if you go back in there and you say, "You know what? I believe this happened. I believe the evidence presented gives me a lasting belief that this happened. Yeah, I would like more evidence." Of course you would like more evidence. But, if you can say that to yourself, "I have a belief that this happened, I have an abiding belief in the truth of the charge," then I carried the burden in this case, the State has carried the burden. If you go back there and you say, "I believe what she told me. I believe that this happened." And then you say, "but." Okay, ask yourselves, if you have reached the point before you say

"but," then you have an abiding belief. Now, it's okay to say "but," because we all would like more evidence in any criminal case. But, if you get to the point where you say, "I believe that this happened, I believe what she told me," then you are satisfied beyond a reasonable doubt. That's the instruction. That's the law.

So, I'm asking you to consider all the instructions, not the parts that Mr. Shaw points out, not the parts that I point out. Read them as a whole. And, as a whole, you will find, if you have an abiding belief in the truth of these charges, in your mind you have a lasting belief that this happened in the way that they say it happened, then he's guilty.

RP 229-30. The State does not misstate the burden or tell the jury that defendant does not receive the benefit of the doubt. The State goes through the instruction and talks about abiding belief, as read directly from the jury instructions. The State tells the jury not that they must just believe this happened but they must have a lasting and abiding belief. The State correctly tells them that they may like more evidence, but if they don't need it to have an abiding belief in the truth of the charge then the State had proven the case beyond a reasonable doubt. The State's argument does not misstate the burden or tell the jury not to give defendant the benefit of the doubt. The State's argument is proper based on the jury instruction. There is no error.

- b. The State made logical inferences from the evidence presented, did not shift the burden to defendant, did not comment on his right not to testify, did not inflame the passions and prejudice of the jury and the jury is presumed to disregard any comment not supported by the evidence.

In closing argument, a prosecutor is permitted to argue the facts in evidence and reasonable inferences therefrom. *State v. Dhaliwal*, 150 Wn.2d 559, 577, 79 P.3d 432 (2003); *State v. Smith*, 104 Wn.2d 497, 510, 707 P.2d 1306 (1985). The prosecutor does not shift the burden of proof when it points out the evidentiary deficiencies of defendant's arguments. *See Russell*, 125 Wn.2d at 85-86. A prosecutor is allowed to argue that the evidence doesn't support a defense theory. *Russell*, 125 Wn.2d at 87.

A prosecutor does not shift the burden of proof when they argue that a defendant's version of events is not corroborated by the evidence. *Gregory*, 158 Wn.2d at 860. "The State is entitled to comment upon quality and quantity of evidence presented by the defense. An argument about the amount or quality of evidence presented by defense does not necessarily suggest that the burden of proof rests with the defense." *Id.*

Defendant alleges that the State violated his right to be free from testifying or from having to disprove the State's case and that the State told the jury that they had to find the State's witnesses lied in order to acquit. Defendant did not object to any of these challenged statements so

any error is deemed waived unless the statements can be said to be  
flagrant and ill-intentioned.

**i. The State did not violate  
defendant's right not to testify.**

Defendant points to several different statements by the prosecutor in closing that he claims are a comment on his failure to testify. However, what defendant fails to point out is that defendant did put on a case. While he himself did not testify, he did put on two witnesses that testified about S.R.'s behavior, including an allegation that it was her dad's house that she didn't want to return to, and that she had lied at some point about a cousin hitting her in order to get the cousin in trouble. RP 177, 185, 186. Because defendant did put on a case, the State is allowed to refer to what evidence defendant presented and any holes in defendant's case. This does not shift the burden of proof.

The State's arguments highlighted what evidence had been presented, that the victim's story had been consistent and that even with the case defendant put on, the elements the State had to prove had not been refuted. The State told the jury that the jury had heard evidence that defendant had sexual intercourse or contact with the victim on four separate occasions and that this was unrefuted. RP 202. This is a true statement based on the evidence presented. None of defendant's witnesses contradicted the victim's story, and the victim's story remained consistent.

Contrary to defendant's claims, the State never told the jury that defendant had to testify and in fact defendant does not point to any statement where this occurred. The State did argue that some of the evidence was unrefuted. "Surely the prosecutor may comment upon the fact that certain testimony is undenied, without reference to who may or may not be in a position to deny it." *State v. Litzenberger*, 140 Wash. 308, 311, 248 P. 799 (1926). If persons other than defendant could have conceivably testified, then statements about testimony being undisputed are permissible because this statement does not draw attention to the defendant not testifying. *State v. Ashby*, 77 Wn.2d 33, 37-38, 459 P.2d 403 (1969).

The State may say that "certain testimony is undenied as long as he or she does not refer to the person who could have denied it." *State v. Fiallo-Lopez*, 78 Wn. App. 717, 729, 899 P.2d 1294 (1995), citing *State v. Ramirez*, 49 Wn. App. 332, 336, 742 P.2d 726 (1987). A statement about undenied testimony only becomes a violation of the defendant's right to remain silent if the statement is "of such character that the jury would 'naturally and necessarily accept it as a comment on the defendant's failure to testify.'" *Id.* at 728-729, citing *Ramirez*, 49 Wn. App. at 336, quoting *State v. Crawford*, 21 Wn. App. 146, 152, 584 P.2d 442 (1978), review denied, 91 Wn.2d 1013 (1979).

In the instant case, the State did not tell the jury that only defendant could have refuted the evidence or that defendant should have

testified. The State merely stated that certain pieces of evidence were unrefuted. While defendant argues that the implication is clear that only defendant could have refuted the evidence that is not supported by the record or the above case law. A relative or friend could have testified that either defendant or the victim were not in the locations as suggested on the days in question. Someone could have testified that the victim told them a different story. There are certainly other possibilities than just defendant taking the stand. Here, the jury saw that there were other people who could testify since defense put on two witnesses. The record does not support that any of the State's arguments indicated that only defendant could have refuted the claims, or that the State commented on this right to silence. The State never told the jury that only defendant could have refuted the testimony or that defendant should have testified. There is no error.

**ii. Showing the victim's story was consistent does not shift the burden.**

A prosecutor's allegedly improper statement is reviewed in "the context of the total argument, the issues in the case, the evidence addressed in the argument, and the instructions given to the jury." *State v. Brown*, 132 Wn.2d 529, 561, 940 P.2d 546 (1997). A prosecutor enjoys reasonable latitude in arguing inferences from the evidence, including inferences as to witness credibility. *State v. Gregory*, 158 Wn.2d 759, 810, 147 P.3d 1201 (2006). Credibility determinations are for the trier of

fact and not subject to review. *State v. Camarillo*, 115 Wn.2d 60, 71, 794 P.2d 850 (1990).

The State presented argument to help the jury evaluate the testimony they had heard and on how much weight they should give to S.R.'s testimony. RP 202-03, 203-06. The State reminded the jury, that in evaluating S.R.'s testimony, that there was no evidence that the victim was coached or that she was lying about the conduct at issue in this case. RP 204, 206. The State's witnesses and the defense witnesses did not provide any evidence that the victim was making this up or give any reason for the jury to doubt her testimony. This is different than the statements in *State v. Fleming*, 83 Wn. App. 209, 921 P.2d 1076 (1996) that defendant cites in his brief. In *Fleming*, the State started their closing argument by telling the jury that in order to find the defendant not guilty, they had to find that the victim was lying about what happened. *Id.* at 213. In the instant case, the State's argument was clearly in reference to how the jury should evaluate the victim's testimony. "I'm going to suggest that, really, you have three options here in evaluating {victim's} testimony, in light of the other three witnesses the State put on and the two witnesses that the defense put on. RP 203 (victim's name omitted). The State's argument in the instant case is in a different context than the argument in *Fleming*. In that instant case, the State did not tell the jury that it had to choose from the three options in order to convict. The State also did not tell the jury that they would have to find the defendant not

guilty if they didn't believe the victim. The State phrased its arguments as showing how the jury should evaluate the testimony and why the jury should find the defendant guilty.

Further, the prosecutor in *Fleming* told the jury that they should assume the defendant would provide some kind of explanation if they were suggesting that there was a reasonable doubt. *Fleming*, 83 Wn. App. at 214. In the instant case, the State made no such claim. The State pointed out the pieces of evidence that were uncontested. The State also went through a detailed explanation of how the jury should analyze the testimony of the victim in light of all the other testimony and noted the consistencies and lack of refutation from the defense case. The State emphasized the victim's consistent story. The State's main point was that the victim, despite her young age, was able to tell people what happened to her and that her story did not change. RP 212. The State pointed out that the jury should look at certain things to determine if the victim was telling the truth such as the fact that she could say more than, "it hurt" but could also describe the pressure she felt. RP 209. The State also argued that the victim had other things she could have said if she didn't want to go over to see her mother or defendant such as her mother putting hot sauce up her nose or defendant slapping her. RP 208. The State used these examples, and the illustrations of the examinations and conduct she had to talk about in this case, to help the jury evaluate the testimony of the victim. RP 207. The State's review of the victim's exam and how that

was not fun was the only challenged statement that defense counsel objected to. RP 207. However, this was not to inflame the passions and prejudices of the jury, but rather to put the victim's testimony in context and to show that she realized this was a serious matter. The State also reminded the jury how most of the witnesses had testified how much the victim loved her mother and that it was reasonable for her not to report so that she could still spend time with her mom. RP 205. The State further asked the jury to look at S.R.'s testimony, "along with all the other circumstances" in order to establish that defendant is guilty. RP 213. The State's arguments were meant to highlight for the jury what the State had proven, that the victim's testimony and statements to others were consistent, that the evidence that made defendant guilty of the crimes was unrefuted, despite the fact that defendant had put on a case. The jury was then left to be the sole judge of credibility. CP 45-66, instruction 1. This is proper argument.

**iii. The State did not tell the jury that it had to find the State's witnesses were lying in order to acquit.**

It is sometimes improper for a prosecutor to tell the jury that their verdict rests on whether they believe one witness or another. *State v. Casteneda-Perez*, 61 Wn. App. 354, 362-63, 810 P.2d 74 (1991) ("[I]t is misleading and unfair to make it appear that an acquittal requires the

conclusion that the police officers are lying.”); *State v. Barrow*, 60 Wn. App. 869, 875-76, 809 P.2d 209 (1991) (concluding that it was misconduct for prosecutor to argue that “in order for you to find the defendant not guilty . . . you have to believe his testimony and completely disbelieve the officers’ testimony”). Statements that guilt or innocence depend on a determination that a witness is lying are inappropriate when it is possible that the testimony of the witness could be “unconvincing or wholly or partially incorrect for a number of reasons without any deliberate misrepresentation being involved.” *Casteneda-Perez*, 61 Wn. App. at 363; *accord Barrow*, 60 Wn. App. at 871, 875-76 (misconduct for prosecutor to say that the defendant was calling the State’s witnesses liars when the defendant presented a mistaken identity theory). However, where “the parties present the jury with conflicting versions of the facts and the credibility of the witnesses is a central issue, there is nothing misleading or unfair in stating the obvious: that if the jury accepts one version of the facts, it must necessarily reject the other.” *State v. Wright*, 76 Wn. App. 811, 825, 888 P.2d 1214 (1995).

In the instant case, the State never told the jury they had to find the victim lied in order to acquit. The State’s argument focused on how they had met their burden and why the jury should find defendant guilty. The State did a thorough review of the evidence and testimony that was presented. *See* RP 200-215. The State told the jury that the victim’s account of what happened, along with the other circumstances testified to,

established the elements of the crimes charged. RP 202-03. The jury had to evaluate whether they believed the victim, and then along with her consistent story and the rest of the circumstances, this would establish defendant's guilt to all four counts. RP 202-03. The State was clear that if each element was met, then defendant was guilty, but if the evidence was insufficient, then he was not guilty. RP 212. The State wrapped up their closing, after having gone through how to evaluate the victim's testimony and all of the evidence that showed the victim's story was consistent and had indicia of reliability and explained that only one story could be true. RP 215. And the story that was supported as truthful through the evidence was the victim's. RP 215. While the State does make an appeal to the jury to tell the victim they believe her and find the defendant guilty, this was not improper argument based on the a review of the entire closing argument and the evidence in this case. RP 215. The case focused on the testimony of the victim and the story she told about what had happened to her. It was the consistency and detailed nature of that story that lent it credibility and it was that story that established the sexual conduct. The State never wavered from the proper burden of proof or from reminding the jury to put the victim's testimony in the context of the other circumstances that were testified to. Further, if the jury did not believe that the State's arguments were supported by the evidence, then they were instructed to disregard them, a fact the State pointed out in its closing. *See* RP 202. The State did not tell the jury to acquit if they did

not believe the State's witnesses; they told the jury to acquit if they didn't meet their burden. The State did not error.

The State's arguments were limited to a review of what the evidence showed and how the State had proven the elements. Pointing out that some of the evidence was unrefuted was not error as the defense presented a case and despite that, the State was still able to meet the elements. The State did not shift the burden, inflame the passion and prejudices of the jury, or improperly comment on witnesses lying. Defendant cannot show that any of these statements were flagrant or ill-intentioned.

2. DEFENDANT RECEIVED CONSTITUTIONALLY EFFECTIVE ASSISTANCE OF COUNSEL AS DEFENDANT CANNOT SHOW DEFICIENT PERFORMANCE OR PREJUDICE.

The right to effective assistance of counsel is found in the Sixth Amendment to the United States Constitution, and in Article 1, Sec. 22 of the Constitution of the State of Washington. The right to effective assistance of counsel is the right "to require the prosecution's case to survive the crucible of meaningful adversarial testing." *United States v. Cronin*, 466 U.S. 648, 656, 104 S. Ct. 2045, 80 L. Ed. 2d 657 (1984). When such a true adversarial proceeding has been conducted, even if defense counsel made demonstrable errors in judgment or tactics, the testing envisioned by the Sixth Amendment has occurred. *Id.* The court

has elaborated on what constitutes an ineffective assistance of counsel claim. The court in *Kimmelman v. Morrison*, 477 U.S. 365, 374, 106 S. Ct. 2574, 2582, 91 L. Ed. 2d 305 (1986), stated that “the essence of an ineffective-assistance claim is that counsel’s unprofessional errors so upset the adversarial balance between defense and prosecution that the trial rendered unfair and the verdict rendered suspect.”

The test to determine when a defendant’s conviction must be overturned for ineffective assistance of counsel was set forth in *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984), and adopted by the Washington Supreme Court in *State v. Jeffries*, 105 Wn.2d 398, 418, 717 P.2d 722, *cert. denied*, 497 U.S. 922 (1986). The test is as follows:

First, the defendant must show that the counsel’s performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as “counsel” guaranteed the defendant by the Sixth Amendment.

Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel’s errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable. Unless a defendant makes both showings, it cannot be said that the conviction . . . resulted from a breakdown in the adversary process that renders the result unreliable.

*Id.* See also *State v. Walton*, 76 Wn. App. 364, 884 P.2d 1348 (1994), *review denied*, 126 Wn.2d 1024 (1995); *State v. Denison*, 78 Wn. App. 566, 897 P.2d 437, *review denied*, 128 Wn.2d 1006 (1995); *State v.*

*McFarland*, 127 Wn.2d 322, 899 P.2d 1251 (1995); *State v. Foster*, 81 Wn. App. 508, 915 P.2d 567 (1996), *review denied*, 130 Wn.2d 100 (1996).

*State v. Lord*, 117 Wn.2d 829, 883, 822 P.2d 177 (1991), *cert. denied*, 506 U.S. 56 (1992), further clarified the intended application of the *Strickland* test.

There is a strong presumption that counsel have rendered adequate assistance and made all significant decisions in the exercise of reasonably professional judgment such that their conduct falls within the wide range of reasonable professional assistance. The reasonableness of counsel's challenged conduct must be viewed in light of all of the circumstances, on the facts of the particular case, as of the time of counsel's conduct.

*Citing Strickland*, 466 U.S. at 689-90.

Under the prejudice aspect, "[t]he defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 U.S. at 694. Because the defendant must prove both ineffective assistance of counsel and resulting prejudice, the issue may be resolved upon a finding of lack of prejudice without determining if counsel's performance was deficient. *Strickland*, 466 U.S. at 697, *Lord*, 117 Wn.2d at 883-884.

Competency of counsel is determined based upon the entire record below. *McFarland*, 127 Wn.2d, at 335 (*citing State v. White*, 81 Wn.2d 223, 225, 500 P.2d 1242 (1972)). The reviewing court must judge the

reasonableness of counsel's actions "on the facts of the particular case, viewed as of the time of counsel's conduct." *Strickland*, 466 U.S., at 690; *State v. Benn*, 120 Wn.2d 631, 633, 845 P.2d 289 (1993), *cert. denied*, 510 U.S. 944 (1993). Defendant has the "heavy burden" of showing that counsel's performance was deficient in light of all surrounding circumstances. *State v. Hayes*, 81 Wn. App. 425, 442, 914 P.2d 788, *review denied*, 130 Wn.2d 1013, 928 P.2d 413 (1996). Judicial scrutiny of a defense attorney's performance must be "highly deferential in order to eliminate the distorting effects of hindsight." *Strickland*, 466 U.S., at 689.

Defendant argues that his counsel was ineffective on two occasions: first that his counsel was ineffective for failing to object in closing and second, that his counsel was unaware of discovery and opened the door to propensity evidence.

During closing, defense counsel did object to one of the above challenged statements. RP 207. Defense counsel also addressed some of the challenged arguments above in his own closing. That is a tactical decision. It is not likely that defendant's objections to the challenged arguments would have been sustained given that the prosecutor's arguments were logical inferences from the evidence and given that he did not misstate the burden of proof as argued above. So choosing not to object to arguments that would likely not have been sustained and that he could deal with in his own closing was a logical trial tactic and cannot be said to be ineffective. Counsel was an advocate for his client, objected

when he needed to and dealt with the State's arguments in his closing.

Defendant cannot show deficient performance or prejudice.

Defendant also alleges that his counsel was unaware of discovery and as such allowed opened the door or propensity evidence. First, the record does not support the assertion that defense counsel was unaware of the information in discovery. Defense counsel did not believe his questions on cross had opened the door to a previous allegation between defendant and the victim. RP 141-42. Defense counsel's inquiry as to what the witness is going to testify to was cut off by the prosecutor saying, "It was in discovery." RP 143. This single comment does not indicate that the defense attorney was unaware of discovery. The defense attorney wanted an offer of proof as to what the witness would actually say on the witness stand. RP 143.

In his cross, defense counsel had asked questions about visitation and didn't think that his question, "And she never indicated at any time, to your knowledge, until around Christmas time of 2008, that Forest Gill was not treating her properly, correct?" had opened the door to the previous report. RP 139. Whether or not it had been a subject of a motion in limine appeared to be in dispute, but bottom line was that defense counsel did not believe he had opened the door to such evidence and argued that any introduction of such evidence would be more prejudicial than probative. RP 141. Defense counsel indicated that his line of inquiry was that Albert Rodrigues would have protected his daughter had he thought

there was anything going on. RP 142. The focus of the questions was on visitation. RP 146. While defense counsel's question was, perhaps, inartfully worded, it's clear from the record that he was aware of the information in discovery and did not think he opened the door to the previous report of abuse. Further, counsel was an advocate for his client in arguing to the judge about why this evidence should not be allowed in and was successful in limiting what the witness could say in terms of the witness was only allowed to testify to his limited knowledge of the previous event that he had relayed to the court in his offer of proof. Defendant cannot show deficient performance as counsel argued vigorously on behalf of his client.

A review of the entire record shows that counsel was a continuous advocate for his client. He conducted cross examination, put on a case for the defense and objected when necessary. It is also clear that he had engaged in some outside investigation as he sought to have some defense exhibits admitted before trial. RP 7-10. Defendant cannot show deficient performance or prejudice based on the acts of his counsel. Defense counsel was not ineffective.

3. THE STATE CONCEDES THAT CONDITION 14 HAS BEEN FOUND TO BE UNCONSTITUTIONALLY VAGUE AND THAT CONDITIONS 24, 26, AND 27 ARE NOT CRIME RELATED AND SHOULD ONLY BE IMPOSED AS PART OF DEFENDANT'S TREATMENT IF DEEMED NECESSARY.

When sentencing a defendant to community custody, RCW 9.94A.703 provides guidance for what restrictions the court may include as part of community custody. Elements mandatory for the court to include in the order of community custody appear in RCW 9.94A.703(1). RCW 9.94A.703(2) lists conditions that the court may choose to waive but shall otherwise impose.

A defendant can raise objections to community custody conditions for the first time on appeal. *State v. Jones*, 118 Wn. App. 199, 204, 76 P.3d 258 (2003) (citing *State v. Julian*, 102 Wn. App. 296, 304, 9 P.3d 831 (2000)). The Washington Supreme Court has generally reviewed matters of sentencing conditions for abuse of discretion. *In re Rainey*, 168 Wn.2d 367, 374, 229 P.3d 686 (2010). Generally, a sentencing judge may impose and enforce crime-related prohibitions and affirmative conditions. *State v. Cayenne*, 165 Wn.2d 10, 14, 195 P.3d 521 (2008); RCW 9.94A.505(8). A crime-related prohibition is statutorily defined as “an order of a court prohibiting conduct that directly relates to the

circumstances of the crime for which the offender has been convicted....”  
RCW 9.94A.030(13).

Defendant challenges four conditions of his community custody.

First, the State concedes that condition number 14, that addresses pornography, is unconstitutionally vague per *State v. Bahl*, 164 Wn.2d 739, 1756-57, 93 P.3d 678 (2008). CP 97-110, 84-96- Appendix H. The State agrees that this case should be remanded to correct the judgment and sentence as to that condition only.

Second, defendant claims that condition number 24 that prohibits his use of the internet without childblocks is not crime related. CP 97-110, 84-96- Appendix H. The State recognizes that in *State v. O’Cain*, 144 Wn. App. 772, 184 P.3d 1262, (2008), Division I of the Court of Appeals determined that such a provision was not crime related where there were no allegations that the internet contributed to the crime. The court did note that their ruling did not prohibit “control over internet access being imposed as part of sex offender treatment if recommended after a sexual deviancy evaluation.” *O’Cain*, 144 Wn. App. at 775.

Defendant was ordered to obtain a Psychosexual Evaluation. CP 97-110, 84-96- Appendix H, condition 11. It is reasonable that this condition may be recommended by the Sexual Deviancy Treatment Provider. The State would ask that this Court adopt the language in *O’Cain* so that it is clear that this condition can be imposed, if necessary, as part of defendant’s sex offender treatment.

Finally, defendant challenges the requirement that he obtain a chemical dependency evaluation and a mental health evaluation. The State concedes that these do not seem to be crime related. To the extent that either of these would be required for defendant's sex offender treatment, the State would ask that it be made clear that these conditions can be imposed, if necessary as part of defendant's treatment.

The State agrees this case should be remanded for resentencing only to remove the above four conditions from defendant's judgment and sentence.

D. CONCLUSION.

For the foregoing reasons, the State asks this Court to affirm defendant's convictions below. The State also asks this Court to remand for resentencing only to remove the four challenged conditions of community custody.

DATED: November 19, 2010

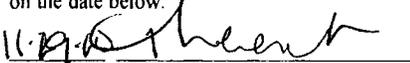
MARK LINDQUIST  
Pierce County  
Prosecuting Attorney



MELODY M. CRICK  
Deputy Prosecuting Attorney  
WSB # 35453

Certificate of Service:

The undersigned certifies that on this day she delivered by U.S. mail or ABC-LMI delivery to the attorney of record for the appellant and appellant c/o his attorney true and correct copies of the document to which this certificate is attached. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington, on the date below.

11.19.10   
Date Signature

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