

STATEMENT OF THE CASE

01. Procedural Facts

Mark J. Gossett (Gossett) was charged by second amended information file in Thurston County Superior Court on April 14, 2010, with two counts of rape of a child in the second degree, counts I-II, two counts of child molestation in the second degree, counts III-IV, and intimidating a current or prospective witness (domestic violence), count V, contrary to RCWs 9A.44.076, 9A.72.110(1)(a) and 10.99.020. [CP 68-69]. Count V was severed from the case. [RP 15-17].

No motions were file nor heard regarding either a CrR3.5 or CrR 3.6 hearing. [CP 18]. Trial to a jury commenced on April 14, the Honorable Carol A. Murphy presiding. Neither exceptions not objections were taken to the jury instructions. [RP 1404].

The jury returned verdicts of guilty as charged on counts I-IV, Gossett was sentenced within his standard range and timely notice of this appeal followed. [CP 160-63, 184-198].

02. Substantive Facts

In June 2000, A.R.G. (dob 11/26/89) and her biological sister S.G. (dob 12/09/87), were placed as foster children in the home of Gossett and his wife Linda [RP 272-274, 343,

830, 896, 963, 966, 992], who adopted teh children in December 2001. [RP 78, 830, 992].

A.R.G., had difficulty adjusting to the Gossetts' strict rules and discipline and was frequently reprimanded up until she reached the 10th grade. [RP 276-77, 279, 281, 304]. In January 2008, during her senior year in high school, A.R.G., following an argument with her mother [RP 120, 144] moved out of the Gossetts' residence, and the following June made her initial allegations of sexual abuse, telling Jennifer Myrick and Roberta Vandervort that since the eighth grade she had been sexually molested by Gossett and that it had gotten progressively worse over the years. [RP 122, 125]. It had started with uncomfortable hugging and French kissing before advancing to "oral sex and things of that nature." [RP 126].

About a month later, in July 2009, A.R.G. was interviewed by Deputy Kurt Rinkel [RP 73, 342, 356-57], and disclosed what she had told Myrick and Vandervort, indicating on three occasions that the sexual abuse happend when she was between age 14 and 18 and continued until January 2008. [RP 369-70]. Similarly, when A.R.G. spoke with Sergeant Evans that October, she told him on two occasions that Gossett had started sexually abusing her when she was 14 and in the eighth

grade. [RP 373-74].

At trial, while admitting she had told the investigating law enforcement officers at least five times that the sexual abuse had started after she turned 14 [RP373], A.R.G. changed her story, saying that the abuse could have started before she turned 14 [RP 343], again depicting how it had progressed from French kissing to the touching of her breasts to digital penetration of her vagina. [RP 296, 299-300]. Further testimony revealed, "the only consistent statements from your testimony today and the interviews with law enforcement, is the first time was downstairs". [RP 382]. "it would occur in the living room, in my bedroom, in the hallway, downstairs, on the tent - - in the tent, on th trampoline, everywhere." [RP 314]. When asked why she never reported this behavior to her mom or anyone else, A.R.G. claimed that Gossett had told her that if she "ever told anybody, my life would be a living hell." [RP 366].

Gossett denied that he ever physically or sexually abused A.R.G. [RP 883-84, 891]. S.G., A.R.G.'s biological sister [RP 963], asserted that A.R.G. had trouble adapting to the Gossetts' rules and required chores: "She was always pushing the limits to things, didn't want to listen,

didn't want to be told to do stuff." [RP 969]. S.G. never observed anything in the way of inappropriate behavior between Gossett and A.R.G. and described her father as "(c)aring, sweet, soft, gentle. He never really yelled at anybody, just kind of goes with the flow with us." [RP 985]. When A.R.G. contacted S.G. after leaving the family residence in January 2008, she never mentioned that she'd been sexually abused. [RP 987].

Six other witnesses familiar with the Gossett household, including Gossett's wife Linda, echoed S.G.'s observation that there was never any indication of inappropriate behaviour between Gossett and A.R.G. [RP 850-51, 953, 1178-79, 1304, 1327, 1356]. Linda Gossett confirmed that A.R.G. had struggled with the adoption process over the years [RP 1117], adding that A.R.G. "spent a good couple of years just being very belligerent. It was hard. I was intimidated by her a lot of times. I tried not to let that show." [RP 1122].

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IT WAS FLAGRANT AND CONSTITUTIONAL
MISCONDUCT TO ARGUE EXCULPATORY
EVIDENCE AND ARGUE THE EVIDENCE
DURING CLOSING ARGUEMENTS.

It is established that a conviction obtained thorough use of false evidence, known to be such by representatives of the State, must fall under the Fourtenth Amendment. The same result obtains when the State, although not soliciting false evidence, allows it to go uncorrected when it appears. (citing State v. Brown, 951 F.2d 1015 (1991) [46]).

The State, knowingly changed testimony in closing arguments to substaniate the States testimony of when the "incidents" occured. The State, from the start of trial, has testified that the incidents occurred during the time period of "age 11, 12 and 13". RP at 293. During cross-examination A.R.G. is confronted with the change of facts and time periods. RP at 338-44. A.R.G. is reminded of testimony given to Deputy Rinkle [RP at 365, 369] and Sergeant Evans, [373, 374] and deposition to defense counsel, [RP at 375], stating testimony of age the incidents started, age 14, in the eighth grade.

The State, throughout the trial has has associated A.R.G. headgear with identifying the time period. "Now do you remember a time

when you first got your head gear? [RP at 296]. Linda Gossett, under cross-examination is asked; "Well, she initially had head gear on May 14th of 2002? [RP at 1230]. And then in October of '04, you wanted her head gear put on permanently; is that right? If that's when the record says, yes. She wouldn't wear it. [RP at 1231]. On redirect of Linda Gossett; "So were there two different periods of time she was at the orthodontist then and with the head gear? Yeah, more toward the end." [RP at 1256].

Understanding the above information from testimony throughout the trial, I now direct your attention to redirect on closing arguments:

"And if you just sat and talked with her, she'd tell you, I know the marked event, I know the event it all started, and it was with the head gear. Counsel wants you to believe the head gear, it's later, it's in the picture, it's 2004 and five. Well, if you listen to the testimony, we know she got her head gear installed 5-14 of '02. Right? Shes's 12 years old. She has it continuously, and it was permanently installed, where she couldn't take it off in October of '04. That's when those pictures are from.

Counsel misdirects prior testimony and evidence to connect the time period she desires instead that of the declarant. Counsel is aware of both time periods. "When you first got your head gear? [RP at 296]. "Well, she initially had head gear on May 14th of 2002? [RP at 1230]. Those were

counsel questions. Counsel was aware of the different periods.

Counsel was aware of her actions and prejudice:

"How did we get here, when, according to defense, well, Alisha said was 14, she's 14, she's 14 she said it five, six, seven times she's in the eighth grade. Well, Alisha doesn't get to choose the charges or the time period. Law enforcement doesn't. The State does. And what did the State learn after talking to Alisha? Well, she thought it was during that time, she thought it was 14. She told everybody that.

¹⁵ I have submitted this information, in context of the trial testimony, to show that counsel knowingly altered the evidence to fit a time period that created a charge greater than that of the testified time period. Counsel knowingly did this and was aware of all facts and even spoke of them during the trial.

It was flagrant and constitutional misconduct to argue false testimony. It was even greater misconduct to do so in closing arguments were no curative jury instruction could amend the harm caused by the misdirect of evidence. The prejudice to a defendants right to a fair trial is even more palpable when the prosecutor has not only withheld exculpatory evidence, but has knowingly introduced and argued false evidence. This circuit has acknowledged that "a prosecutor's presentation of tainted evidence is viewed

seriously and its effects are exceedingly carefully scrutinized." United States v. Polezzi, 801 F.2d 1543, 1550 (9th Cir. 1986). A new trial is required "if there is any reasonable likelihood that the false [evidence] could have affected the judgement of the jury." (citing from State v. Brown, 951 F.2d 1015 (1991) [45]).

In this case, the jury trusted the State to relate the facts of the trial. The jury was but moments from the jury room and conclusion from this case. The prosecutors comments provided closure and ease of mind to the jury to help determine the fate of the appellant. This was vindictive conduct on behafe of the State. This behavior demands a reverse and remand.

IT WAS FLAGRANT AND CONSTITUTIONAL
MISCONDUCT TO ADMIT EXCULPATORY
EVIDENCE AND KNOWING ARGUE THE
INTRODUCED DURING CROSS-
EXAMINATION.

The proper role of the criminal prosecutor is not simple to obtain a conviction, but to obtain a fair conviction. *Brady v. Maryland*, 373 U.S. at 87. It was to insure that defendants are not subject to unfair trials that the limits on prosecutorial conduct evolved. Accordingly, when exculpatory evidence is withheld, attention focuses on its effect on the defendants right to due process: the prosecutor's intentions are irrelevant. *United States v. Agrus*, 427 U.S. 97, 110 (1976); *Thomas v. Cardwell*, 626 F.2d 1375, 1382 n.24 (9th Cir. 1980), cert denied, 449 U.S. 1089 (1981). The prejudice to a defendants right to a fair trial is even more palpable when the prosecutor has not only withheld exculpatory evidence, but has knowingly introduced and argued false evidence. This circuit has acknowledged that "a prosecutor's presentation of tainted evidence is viewed seriously and its effects are exceedingly carefully scrutinized." *United States v. Polezzi*, 801 F.2d 1543, 1550, (9th Cir. 1986).

Where a prosecutor's questions refer to extrinsic evidence that is never introduced, "[d]eciding if the questions are inappropriate

requires examining whether the focus of the questioning is to impart evidence within the prosecutor's personal knowledge without the prosecutor formally testifying." *State v. Lopez*, 95 Wn. App. 842, 855, 980 P.2d 224 (1999)(citing 5A Karl B. Tegland, *Washington Practice, Evidence Law & Practice*, §258 at 125 (3d ed. supp. 1998)). There is no conceivable purpose for asking these questions without rebuttal witnesses available other than to impart to the jury the prosecutor's knowledge of extrinsic evidence not admissible into testimony.

The Supreme Court has found due process violations in several cases where prosecutors knowingly have introduced and argued from false testimony. See *Mooney v. Holohan*, 294 U.S. 103, 112 (1935)(prosecutor based on perjured testimony) *Miller v. Pate*, 386 U.S. 1 (1967)(prosecutor proffered men's undershorts allegedly stained with murder victims blood, when stains were actually paint): *Naupe v. Illinois*, 360 U.S. 264 (1959)(prosecution witness falsely testified that he had not received consideration for his testimony): *Giglia v. United States*, 405, 150 (1972)(same).

An appellant alleging prosecutorial misconduct bears the burden of showing both improper

conduct and prejudicial effect. *State v. Brown*, 132 Wn.2d 529, 561, 940 P.2d 546 (1997). To establish prejudice, the defendant must show a substantial likelihood that the misconduct affected the jury's verdict. Where, as the defense counsel did not object to the challenged arguments below, the appellant must demonstrate that the misconduct was so "flagrant and ill-intentioned" that it caused prejudice that a curative instruction could not have remedied." *State v. Boehning*, 127 Wn. App. 511, 518, 111 P.3d 899 (2005)(citing *State v. Russell* 125 Wn.2d 24, 86, 882 P.2d 747 (1994). The challenged remarks are reviewed "in the context of the total argument, the issues in the case, the evidence addressed in the argument, and the instructions given." *State v. Anderson*, 153 Wn. App. 417, 427, 220 P.3d 1273 (2009).

Moreover, prosecutorial misconduct may deprive a defendant of a fair trial as guaranteed under the State and federal constitutions. *State v. Reed*, 102 Wn.2d 140, 145, 684 P.2d 699 (1984). In that case, it sufficient for appellant to establish the impropriety and prejudice, defined as a substantial likelihood that the misconduct affected the jury's verdict. *State v. Dhaliwal*, 150 Wn.2d 759, 809, 147 P.3d 1201 (2006); *Tate*

v. Russell, 125 Wn.2d 24, 86, 882 P.2d 747 (1994).

The prosecutor used impeachment as a guise for submitting to the jury substantive evidence that otherwise was unavailable. State v. Babich, 68 Wn. App. 438, 444, 842 P.2d 1053 (quoting United States v. Silverstein, 737 F.2d 864, 868 (9th Cir. 1984)), review denied, 121 Wn.2d 1015 (1993). During cross-examination of Linda Gossett the following extrinsic and unsubstantiated facts were presented to the jury with a show of persistence and apparent show of authenticity:

[RP at 1221]

Q - In fact, it was the Cascade Boys Ranch, do you know Jeff Shelton there?

A - Yes, I do.

Q - He described your family as a dysfunctional, over-restrictive environment?

Objection as to how somebody else described the family. That's hearsay. Objection overruled.

[RP at 1219]

Q - Right. And DSHS, they actually had advised for a different type of therapy; is that right? Long-term therapeutic care; is that right?

A - No, that's not true.

[RP at 1217]

Q - Yes, I can. The professionals at Northwest Attachment, when you initially had him taken up to investigate his reactive attachment disorder - -

A - Uh-huh

Q - - they didn't tell you that he wasn't going to get better, that he wasn't going to respond to treatment?

[RP at 1260]

[RP at 1260]

Q - And, in fact, after Tristen was removed, you didn't want him to have any pictures of his only biological brother, Andrew; is that right?

A - No.

Q - In fact, you had to be brought back - - in fact, your husband had to be brought back to court to be ordered by the judge to do it; is that right?

A - No.

Q - In fact, only after you were told and he was threatened to be put in jail because of noncompliance that it actually occurred; is that right?

A - No.

Q - And you wouldn't give Andrew any of his clothes, either; is that right?

A - Andrew.

Q - Excuse me. Tristen.

A - No, that's a lie.

[RP at 1218]

Q - They're all at Tenino School District; is that right?

A - I would guess so.

Q - Right. And they didn't experience anything unusual for Tristen with his outrageous behavior, as you described him; is that right?

A - No.

Q - In fact, they stated he was not a disciplinary problem; is that right?

A - That is true, yes.

Q - In fact, they felt that you were overstating his problems and were - - well, I';; start with that. You were overstating his problems; is that right?

A - They may have felt that way, sure.

Q - And they felt it was your home environment that was so restrictive that this poor child couldn't function; is that right?

A - I do not believe that's true.

The State needed testimony to substantiate A.R.G. testimony, [RP 280-82] concerning who was "good" or "bad" and to draw conclusions to a home in turmoil, per testimony of declarant. By virtue of the State offering this testimony and offering no support testimony of the named

individuals, including DSHS, substantiates the claim by the appellant. Due process rights and constitutional right to face an accuser have been breached. Uncorroborated evidence was introduced to the jury to impeach the testimony of the [defendant] and his wife. Statements made by the prosecutor did not allow the [defendant] the opportunity to call witnesses to rebut the statements. The testimony was presented with a show of persistence and apparent show of authenticity. The jury was left to believe the statements, because the defense could not respond with additional witnesses. Other issues, outside of prosecutorial misconduct such as patient-client confidentiality.

The misconduct of the State produce false testimony that affected the jury by producing emotion and fear or the Gossetts. A prosecuting attorney, in his remarks to the jury, may not indulge in appeal wholly irrelevant to any facts or issues in case, purpose and effect of which can only be to arouse passion and prejudice. *Viereck v. United States* (1943 318 U.S. 236, 87 L.Ed. 734, 63 S. Ct. 561).

Reverse and remand.

TRIAL COURTS ABUSE OF DISCRETION IN
ALLOWING EXPERT TESTIMONY ON NOVEL,
'PROFILE' - 'SYNDROME'.

Constitutional error occurred when the court allowed expert testimony regarding a 'profile' or 'syndrome' of sexually abused children. The court further erred by allowing the 'profile' or 'syndrome' of "Complex Trauma" to substantiate issues that should have been from the experts experience. Instead the experts testimony was substantiated by medical and psychological syndrome of "Complex Trauma", which was proven, during direct testimony by the expert, not to be approved. The association of these factors, to an approved 'profile' or 'syndrome', produced an abuse of discretion of the court and produced constitutional error.

"Expert testimony is allowed for challenging delay syndrome". *State v. Petrich*, 101 Wn.2d 566, 683 P.2d 173 (1984); *State v. Graham*, 59 Wn. App. 418, 424, -25, 798 P.2d 314, 317-18 (1990). "Expert testimony regarding a child sex abuse profile or syndrome, that is, behaviors of the victim that are common behaviors of sexually abused children, has been ruled inadmissible on grounds that it has not been shown to be supported by accepted medical or scientific opinion." *State v. Jones*, 71 Wn. App. 798, 813-14, 863 P.2d 85, 94 (1993); review denied, 124 Wn.2d 1018, 881 P.2d 254 (1994); *State v. Maule*, 35 Wn. App. 287, 667 P.2d 96 (1983).

Further, "...we concluded that to permit jury

reliance on unproven scientific techniques to bolster otherwise uncorroborated child testimony would deprive Lawrence of a fair trial." Wash. v. Jones, supra (citing State v. Lawrence, 541 P.2d 1291 (Me 1988)).

The admission of scientific testimony involves two related inquiries, each governed by separate standards. First, has the scientific theory or principle from which the evidence is derived garnered general acceptance in the relevant scientific community under the standard of Frye v. United States, 293 F. 1013, 34 A.L.R. 145 (D.C. Cir. 1923)? Second, is the expert testimony properly admissible under ER702? Hanes, at 232; State v. Cauthron, 120 Wn.2d 879, 885, 846 P.2d 502 (1993). Under the Frye standard, our task is not to determine if the scientific theory underlying the proposed testimony is correct; rather, we look to see whether it has achieved general acceptance in the appropriate scientific community. Cauthron at 887. "The core concern of Frye is only whether the evidence being offered is based on established scientific methodology. This involves both an accepted theory and a valid technique to implement that theory." Cauthron, at 889.

The State's expert witness, Ms. Jones, concluded that research in the psychological field must be

scrutinized by peer-review and be submitted to a review committee. Upon review, the research can be rejected or sent back for further research and clarification. RP at 631 (Summary of testimony). Ms. Jones testimony during direct provides knowledge that "Complex Trauma", "...is not officially in the diagnostic manual for psychologists at this point. Its under review in the next diagnostic manual."

RP at 710. Further testimony provides:

A - We have a training certificate, but theres no certification as like a subspecialty....

Q - I see. So, eventually, if there was one to be emerged as an official subspecialty, that would be kind of, I guess, maybe a step to that certification, is that not right?

A - Possible. Yeah.

RP at 712

Further testimony exposes that training for "Complex Trauma" is unofficial and not credentialled; "It wasn't a State credential. It was a program credential." RP at 628.

Ms. Jones tells the Court (1) "Complex Trauma" is not approved by peer-review and not yet adapted by the medical and psychological community, (2) the process necessary to be accepted in the medical and psychological community, (3) "Complex Trauma" is not yet certified as a subspecialty or approved by any medical or psychological committee, and (4) is not yet State certified as a specialty of psychology.

Further testimony concludes that "Complex Trauma" originally was termed "complex PTSD". RP at 711. Post Traumatic Stress Disorder is recognized within the scientific and psychiatric communities. STate v. Ellis 136 Wn.2d 498, 522, 963 P.2d 843 (1998). This Court has determined in State v. Riker, 123 Wn.2d 351, 869 P.2d 43, that "[S]cientific validity for one purpose is not necessarily scientific validity for other unrelated purposes: Daubert v. Merrell Dow Pharmaceuticals, Inc. 508 U.S. 576, 125 L.ED 2d, 113 S. Ct. 2786, 2796 (1993). This accociation to "PTSD" does not provide acceptance to the Courts, much less the medical and psycholgical community's. This would provide the same conclusion in regards to "Complex Trauma" in adults and "Complex Trauma" in adolecants. The acceptance of facts "for one purpose is not necessarily scientific validity for other unrelated purposes."

"...the Courts opinion in Jones, supra., regarding a profile or syndrome of child sexual abuse victims in not admissible to prove the existence of abuse that the defendant is guilty." State v. Michaels, 264 N.J. Super. 579, 625 A.2d 489 (1993); (and all other citings). "...because the use of testimony on general behavior characteristics of sexually abused children is still the subject of contention and dispute among experts in the field, we find that its use as a general profile

to be used to prove the existence of abuse is inappropriate." State v. Jones, supra.

Ms. Jones testimony exceeded the confines of delayed disclosure and was used as evidence to substantiate uncorroborated testimony and introduce evidence not admissible, except by means of approved syndrome and profile testimony. The Courts ruling, RP at 700, concerning "Complex Trauma" ruled against standing case law prohibiting expert testimony on unapproved medical and psychological profiles and syndromes.

Issues introduced via this testimony were; neglect, sexual assault, physical abuse, absentee parent, and moving from multiple foster homes. RP at 711.

Objections were raised to the form of the question relating to "Complex Trauma", "which is more broad than what we're dealing with here." RP at 715. Further clarification stated that "She should be asked to restrict the response to allegations of sexual abuse, not "Complex Trauma", which applies to a lot of other things." RP at 715. The second objection stated; "I'm going to object to the questioning and limiting it to the 12-to-14 age bracket.": RP at 716. Both objections were overruled.

"An expert's scientific or technical testimony must be based upon a scientific principle or explanatory theory that has gained general accept-

ance in the scientific community. *State v. Black*, 109 Wash. 2d at 342 (citing *Frye v. United States*, 293 F. 1013, 1014, 34 A.L.R. 145 (D.C.Cir. 1923)). The testimony given by Ms. Jones does not meet either prong of *State v. Black*, supra. Ms. Jones acceptance to the court was based upon her own experience. RP at 700

Unapproved expert testimony revolving around "Complex Trauma", in relationship to children, denied the defendant a fair and constitutional trial. Testimony by the expert witness concerning issues of; neglect, sexual assault, physical abuse, absentee parent, moving from foster homes, and all components associated with "Complex Trauma" established corroborating evidence that was State and federally unconstitutional in regards to admission of profile and syndrome testimony. Constitutional error was caused by the Court admitting into evidence testimony not approved under *Frye*, the medical or psychological community's. This requires a reversal and remand.

STATEMENTS AND VOUCHING OF
TESTIMONY BY THE STATE WAS
BLANTANT PROSECUTORIAL
MISCONDUCT.

Improper vouching generally occurs (1) if the prosecutor expresses his or her personal belief as to the veracity of the witness or (2) if the prosecutor indicates that evidence not presented at trial supports the witness's testimony. *United States v. Brooks*, 508 F.3d 1205, 1209 (9th Cir. 2007) (quoting *United States v. Hermanek*, 289 F.3d 1076, 1098 (9th Cir. 2002)). "It is misconduct for a prosecutor to state a personal belief as to the credibility of a witness." *Warren*, 165 Wn.2d at 30 (citing *Brett*, 126 Wn.2d at 175). Whether a witness has testified truthfully is entirely for the jury to determine. *Brooks*, 508 F.3d at 1210 (quoting *United States v. Ortiz*, 362 F.3d 1274, 1279 (9th Cir. 2004)).

The State personally vouched for the testimony of Sergeant Evans during closing arguments:

Now, counsel talked about all these giant inconsistencies and said, well, we've heard that she told a whole different story to Sergeant Evans. Did anybody hear from Sergeant Evans? Did he testify? No, he didn't. We know exactly what she told him, but I'd submit if it was glaringly different, we'd hear a lot more about it, and we didn't. [RP at 1515].

Unlike *Warren*, *supra.*, Sergeant Evans did not testify and the report speaks for itself. It is

not the place of the State to substantiate testimony presented or not presented. If the report stood on its own merit, than the State would have shown its proof, beyond a reasonable doubt, prior to closing arguments. The State will claim it was rutting te defenses theory, but the defense was stating the facts presented in trial, not rebutting.

During closing, yet again, the State comments on the testimony of a witness, Carol Benek:

Well, Carol Benek. You know, Carol Benek, bless her heart, I think she's probably a really nice lady. She just had it wrong, folks.

[RP at 1517].

And again in regards to Richard Wiley:

Said, well, why didn't you tell? You were surrounded by State Patrol. Well, who is living in this little chalet on the property, this one-room hut, that apparently all of Washington State Patrol loves to rent from them? These people, well, one of them, Wiley, we assume or we hear, is this commissioned officer. Where's Wiley? We didn't hear from him.

[RP at 1522-23].

Any comments by the State during closing need to be reviewed in context of the surrounding statements. Direct or indirect comments are prejudicial. They direct the juror to issues associated with the context of the argument. Hypatheticallspeaking, if I was to say Carol Benek is a wonderful person and then make comments

like that at [RP 1517], it would be lightly taken in regards to her as a person; loving, caring and so on. In context of this trial, starting from [RP 1515], the State, in a last ditch effort, is proclaiming doubt and speculation instead of producing the evidence that proves guilt beyond a reasonable doubt.

As an engineer, I may not be able to express what I am seeing in the Report of the proceedings but I believe that I have conveyed the rhetoric the State went through to prejudice the defendant of a fair trial. Commenting on the credibility of witnesses and testimony is a constitutional error. Respectful, reverse and remand.

IT WAS FLAGRANT MISCONDUCT OF
THE STATE TO ADMIT EVIDENCE THAT
CONTRADICTED THE STATES WITNESS.

The proper role of the criminal prosecutor is not simply to obtain a fair conviction. *Brady v. Maryland*, 373 U.S. at 87. It was to insure that defendants are not subject to unfair trials that the limits on prosecutorial conduct evolved. Accordingly, when exculpatory evidence is withheld, attention focuses on its effect on the defendants right to due process: the prosecutor's intentions are irrelevant. *United States v. Argus*, 427 U.S. 97, 110 (1976); *Thomas v. Cardwell*, 626 F.2d 1375, 1382 N.24 (9th Cir. 1980), cert. denied, 449 U.S. 1089 (1981). The prejudice to a defendants right to a fair trial is even more palpable when the prosecutor has not only withheld exculpatory evidence, but has knowingly introduced and argued false evidence. This circuit has acknowledged that "a prosecutor's presentation of tainted evidence is viewed seriously and its effects are exceedingly carefully scrutinized". *United States v. Polezzi*, 801 F.2d 1543, 1550 (9th Cir. 1986). A new trial is required "if there is any reasonable likelihood that the false [evidence] could have affected the judgement of the jury." (citing *State v. Brown*, 951 F.2d 1015 (1991)).

The State, during cross-examination of Laura Chase, testified to facts that contradicted testimony of the declarant.

A - I was with somebody.

Q - Who were you with?

A - Somebody that was sitting at another table.

Q - And she was not with anyone?

A - Not that I know of, no sir.

[RP at 478]

Q - Ms. Chase, did you contact the Gossetts' and let them know that you were meeting Alisha at that Starbuck's?

A - No.

Q - Did you....

A - I didn't have any time. It was minutes, I was home for minutes before I left to go out the door.

Q - Did they have any idea that either you or Alisha would be there?

A - No. I don't know if they knew Alisha would be there. They didn't know I was going to be there.

Q - So them driving by and actually coming to that Starbucks was a complete coincidence.

A - They didn't come by.

Q - Not that you saw is that right?

A - Not that I saw.

[RP at 1374]

Q - Now, did she ever specifically ask you if you were sexually abused by Mark Gossett?

A - I believe she did, but I don't remember.

Q - Do you remember what your response was to that?

A - The reason why I'm hesitant is because I remember wanting to tell her, but I never did because of a situation happened outside of the Starbucks.

Q - What was going on outside the Starbucks?

A - I asked her to meet me alone, and I saw the Gossett's car drive by the Starbucks in the back road.

Q - Did you think that she had basically called your folks to basically come and confront you somehow at the Starbucks?

A - I just kind of thought that they were all going to kind of gang up on me at Starbucks, and then I just lost trust.

[RP at 1382-83]

In summary, the State entered testimony that contradicted the declarants original testimony in an attempt to resolve conflicts in testimony. [RP at 1374]. The declarant had testified on cross-examination that "she" was not with anyone. [RP at 478]. The declarant, on rebuttal changes her statement to an incident going on "outside". [RP at 1382-83].

The prejudice throughout this case, but now focused on this one incident, is obvious. Win, no matter the cost. The testimony of Chase shows the prejudice that the States representative would take to minimize testimony that shows a true compation towards an individual, A.R.G.

The Supreme Court has found due process violations in several cases where prosecutors knowingly have introduced and argued from false testimony. *Mooney v. Holohan*, 294 U.S. 103, 112 (1935).

analysis of the majority" concerning "Generic Testimony" to three basic points. Jones Cal. Rptr. at 623. (1) the alleged victims must describe the kind of act or acts with sufficient specificity to allow the trier of fact to determine sufficient certainty to support each of the counts alleged by the prosecution. (2) the alleged victim must describe the number of acts committed with sufficient certainty to support each of the counts alleged by the prosecution. (3) the alleged victim must be able to describe the general time period in which the acts occurred. The trier of fact must determine whether the testimony of the alleged victim is credible on these three points.

The first prong, the alleged victim must describe the kind of act or acts, with sufficient specificity to allow the trier of fact to determine sufficient certainty to support each of the counts alleged. Two examples, in case law, appear to set the standard for "Generic Testimony" and provide a minimum standard. State v. Hayes. 81 Wash. App.; generic testimony (e.g., an act of intercourse "once a month for three years outlines a series of specific, albeit, undifferentiated, incidents each of which mounts to a separate offense, and each of which could support a separate criminal sanction. The second citing is in State v. Brown Wash. App. at 741;

"she did not specify dates but described in detail the defendants usual conduct."

The declarant statement to Detective Rinkle, states various acts, stating many locations and a time period starting at age 14, in the eighth grade. [RP at 342-68]. Statement to Sergeant Evans, reports different first time, different first location and occurring at age 14, in eighth grade. [RP at 374-79]. In a deposition for the defense states different first time with the first time as starting at age 14. [RP at 374-79]. Trial testimony produced varying statements of sexual abuse conflicting with the previous, pre-trial, statements. [RP at 270-338].

The definition of incidents is defined as act, time, place and events surrounding. The lack of consistent and corroborated testimony to define the acts alleged left the jury to define and determine the acts for the declarant that would fulfill jury instructions 9 & 10. The jury, with the evidence presented, could never have obtained "sufficient certainty" to convict on any of the charged counts. The conflict of testimony is again highlighted by testimony from the declarant:

A - I don't know what I told you so I don't

know what else to say. I don't know
what I told you Sir.

[RP at].

Cross-examination of A.R.G. [RP at 339-45] continues the questioning concerning age and testimony states, "I said I beleive - acutually, excuse me. I said I don't recall the time it started. I said it could have been between the age of 11,12, or 13." [RP at 343].

The declarants testimony was unsubstantiated:

A - Mark started to molest me in the middle of the night and touch in inappropriate places and come into the bedroom...or he would come into my bedroom at night.
[RP at 294].

Contradicted by S.G., A.R.G. biological sister:

Q - Did you ever remember waking up and seeing A.R.G. not there?

A - No.

Q - Do you remember Mark coming into your room and waking you up?

A - No.

Q - I don't mean rousing you, but you waking up because Mark was in the room?

A - No.

[RP at 982-83].

During cross-examination, defense counsel tries to tie the alleged abuse to events and holidays, each time receiving the answer of "no". [RP at 385-86].

The only relationship to time, or a time period, is drawn by relationship to "head gear". [RP at 296]. The State, in closing, misrepresents

evidence in an attempt to resolve the issue of time and relationship to time of the alleged abuse. In closing arguments, the State testifies that the headgear was continuous. [RP at 1513]. Testimony was produced by Linda Gossett that the head gear was worn twice and wired in towards the end. [RP at 1255-56].

In summary, the statements made by A.R.G. concerning the alleged abuse she claims was rebutted and her statements concerning incidents in the bedroom with her sister present were refuted.

In close, A.R.G. testimony failed to provide the necessary information for the jury to conclude that any incident occurred. The final statements from the State:

If you have an abiding belief, and that means if you feel it in your gut and in your heart and in your head that the defendant committed four separate acts, and that means, if you believe that he inserted his fingers into her vagina, if you believe that he performed oral sex on her, if you believe that he touched her breasts or grabbed her bottom or french kissed her or humped her, then you are satisfied beyond a reasonable doubt....
[RP at 1526].

At no time did the State draw inference to specific acts during specific times. The reason, because the State is, and was, aware that it had failed to establish that prong. This lack, on behalf of the State, demands reversal.

DUE TO THE MANY ERRORS
BY THE STATE AND THE COURT
THE CUMMULATIVE ERRORS
DOCTRINE IS IN AFFECT.

Finally, Mr. Gossett contends that the combined errors by the State and the trial court, denied the defendant of a fair trial. The effects of the errors denied Gossett his due process rights based on the cumulative error doctrine. *State v. Coe*, 101 Wash. 2d 772, 684 P.2d 668 (1984).

The doctrine of cumulative error is a ground for reversal if "the combined effect of an accumulation of errors, no one of which, perhaps, standing alone might be sufficient gravity to constitute grounds for reversal, may well require a new trial." *State v. Badda*, 64 Wash. 2d 176, 183, 385 P.2d 859 (1963).

The prejudice, unfairly shifted the Burden of Proof in favor of the State and denied Gossett his Due Process Rights.

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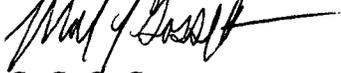
I certify that I mailed a copy of the above brief to my wife, Linda Gossett, who in return has photocopied and mailed via the United States Mail, first class postage pre-paid, to the following people at the addresses indicated:

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DATED this 16th day of March 2011.

Mark J. Gossett



S.C.C.C.

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