

NO. 42215-8-II

COURT OF APPEALS OF THE STATE OF WASHINGTON,

DIVISION II

STATE OF WASHINGTON,

Respondent,

vs.

ARTHUR SETH,

Appellant.

BRIEF OF APPELLANT

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TABLE OF CONTENTS

	Page
A. TABLE OF AUTHORITIES	iv
B. ASSIGNMENT OF ERROR	
1. Assignment of Error	1
2. Issue Pertaining to Assignment of Error	2
C. STATEMENT OF THE CASE	
1. Factual History	3
2. Procedural History	5
D. ARGUMENT	
I. THE TRIAL COURT DENIED THE DEFENDANT A FAIR TRIAL UNDER WASHINGTON CONSTITUTION, ARTICLE 1, § 3, AND UNITED STATES CONSTITUTION, FOURTEENTH AMENDMENT, WHEN (1) IT ALLOWED AN EXPERT WITNESS WHO PERFORMED A FORENSIC EXAMINATION ON THE COMPLAINING WITNESS TO REPEAT THE ALLEGATIONS OF ABUSE THE COMPLAINING WITNESS MADE TO HER, AND (2) WHEN IT ALLOWED THE MOTHER AND SISTER OF THE COMPLAINING WITNESS TO REPEAT HER CLAIMS OF ABUSE TO THEM	11
II. THE TRIAL COURT VIOLATED THE DEFENDANT’S RIGHT UNDER WASHINGTON CONSTITUTION, ARTICLE 4, § 16, TO BE FREE OF JUDICIAL COMMENTS ON THE EVIDENCE WHEN IT REPEATEDLY REFERRED TO THE COMPLAINING WITNESS AS THE “VICTIM” ...	22
E. CONCLUSION	27

F. APPENDIX

1. Washington Constitution, Article 1, § 3	28
2. Washington Constitution, Article 4, § 16	28
3. United States Constitution, Fourteenth Amendment	28
4. Instruction No. 12	29
5. Instruction No. 13	30
6. Special Verdict Form - Count 2	30

TABLE OF AUTHORITIES

Page

Federal Cases

Bruton v. United States,
391 U.S. 123, 20 L.Ed.2d 476, 88 S.Ct. 1620 (1968) 11

State Cases

State v. Ashcraft, 71 Wn.App. 444, 859 P.2d 60 (1993) 13, 16, 17

State v. Black, 109 Wn.2d 336, 745 P.2d 12 (1987) 24

State v. Bogner, 62 Wn.2d 247, 382 P.2d 254 (1963) 22

State v. Bouchard, 31 Wn.App. 381, 639 P.2d 761 (1982) 14, 17

State v. Butler, 53 Wn.App. 214, 766 P.2d 505 (1989) 13-19

State v. Carlin, 40 Wn.App. 698, 700 P.2d 323 (1985) 24, 25

State v. Crotts, 22 Wash. 245, 60 P. 403 (1900) 22

State v. Dahl, 139 Wn.2d 678, 990 P.2d 396 (1999) 11

State v. Ford, 137 Wn.2d 472, 973 P.2d 472 (1999) 11

State v. Hamlet, 133 Wn.2d 314, 944 P.2d 1026 (1997) 21

State v. Hansen, 46 Wn.App. 292, 730 P.2d 670 (1986) 22

State v. Lane, 125 Wn.2d 825, 889 P.2d 929 (1995) 22, 23

State v. Robinson, 44 Wn.App. 611, 722 P.2d 1379 (1986) 14, 17

State v. Swenson, 62 Wn.2d 259, 382 P.2d 614 (1963) 11

Constitutional Provisions

Washington Constitution, Article 1, § 3 11
Washington Constitution, Article 4, § 16 22
United States Constitution, Fourteenth Amendment 11

Statutes and Court Rules

ER 801 11
ER 802 11
ER 803(a)(4) 11, 12, 17, 19

Other Authorities

5A K. Tegland, *Washington Practice* § 367 at 224 (2d ed. 1982) 12

ASSIGNMENT OF ERROR

Assignment of Error

1. The trial court denied the defendant a fair trial under Washington Constitution, Article 1, § 3, and United States Constitution, Fourteenth Amendment, when (1) it allowed an expert witness who performed a forensic examination on the complaining witness to repeat the allegations of abuse the complaining witness made to her, and (2) when it allowed the mother and sister of the complaining witness to repeat her claims of abuse to them.

2. The trial court violated Washington Constitution, Article 4, § 16, when it commented on the evidence by repeatedly referring to the complaining witness as the “victim” of the defendant’s crimes.

Issues Pertaining to Assignment of Error

1. Does a trial court deny a defendant a fair trial under Washington Constitution, Article 1, § 3, and United States Constitution, Fourteenth Amendment, if (1) it allows an expert witness who performed a forensic examination on the complaining witness to repeat the allegations of abuse the complaining witness made to her, and (2) if it allows the mother and sister of the complaining witness to repeat her claims of abuse to them when there is no evidentiary basis for the admission of this evidence and when the jury more likely than not would have returned a verdict of acquittal but for the admission of this improper evidence?

2. Does a trial comment on the evidence and thereby violate Washington Constitution, Article 4, § 16, if it repeatedly refers to the complaining witness as the “victim” of the defendant’s crimes?

STATEMENT OF THE CASE

Factual History

During the summer of 2008, the defendant Arthur Seth lived in an apartment above a garage on Todd Road near Brandt Street in the City of Vancouver. RP 324. This residence consisted of one large room with a couch and television in the middle and a bed against the wall. RP 143-145. At that time, the defendant was 41-years-old. RP 339-340. While living in the apartment, his 12-year-old niece SM occasionally visited him. RP 328-332. At the time, SM's best friend was 11-year-old AV. RP 133-135, 303-307. The two girls were one year apart in school and spent a great deal of time together. *Id.* SM had previously spent the night with AV at AV's house on a few occasions. RP 137-139.

Sometime in June of 2008, AV spent the night with SM at SM's house. RP 137-140. The next day, she and SM walked over to the defendant's apartment to visit him. RP 140-142. Once there, they went upstairs and found the defendant sitting on the couch. RP 143-145. Although the defendant drank alcohol and used marijuana during this period of time in his life, both he and SM denied that he offered marijuana or alcohol to SM and AV while they were at his apartment. RP 315-319, 328-332. However, he did allow the two girls to smoke cigarettes while they were in his home. *Id.* According to SM, she and AV stayed about 30

minutes and then went outside and played for a little while on a trampoline. RP 308-311. The two of them then walked back to SM's house. RP 310-311. SM later stated that AV was with her the whole time they were at the defendant's house, and that the defendant in no way touched or assaulted AV in any manner. RP 308-311. SM did state that after this period of time, AV told her that she did not want to be friends anymore. RP 315-319.

After returning from the defendant's apartment, AV called her mother and asked for a ride home. RP 112-115. On the ride home, AV was not her usual talkative self. *Id.* Following this date, SM would call periodically but AV would not speak with her. *Id.* About a year later, AV's mother was away from home when she received a call from her daughter SV. RP 115-118. During this call, SV asked her mother to come home because AV needed to talk to her. *Id.* Once home, AV told her mother that the defendant had raped her. *Id.* AV's mother then called the police. RP 118-119. AV also stated that she had told SM what her uncle had done to her while they walked back to SM's house. RP 164-167. However, SM denied that any such conversation took place. RP 315-319.

Once interviewed by her mother and the police, AV claimed for the first time that the defendant had raped her in June of 2008 when she and SM visited him at his apartment. RP 140-151. Specifically, she stated that when she and SM entered the defendant's apartment, SM sat on the couch with the

defendant and she sat on the corner of the bed. RP 142-144. The defendant then asked both of them if they wanted to drink some alcohol or smoke some marijuana. *Id.* Although AV claimed that she declined the offer, SM did drink alcohol and smoke marijuana to the point that she passed out on the couch. RP 143-145. When SM passed out, the defendant walked over to the bed, put his hand over AV's mouth, and pushed her down on the bed, and said "shut the fuck up" or he would "kill her and her family." RP 145-148.

According to AV, at this point, the defendant pulled her pants down, pulled his pants down, and proceeded to rape her by putting her penis in her vagina. PR 145-150. AV claimed that the rape lasted between five and ten minutes. *Id.* After the defendant was done, he pulled his pants up, pulled her pants up, and then sat back down on the couch. *Id.* AV went on to state that once the defendant had raped her, she was able to rouse S.V. and the two of them left the defendant's apartment. *Id.* Although she did tell her mother that the defendant had offered her alcohol and marijuana, she did not tell anyone about the rape for over a year. RP 114-115, 169-170

Procedural History

By information filed June 4, 2010, and amended on January 20, 2011, and May 2, 2011, the Clark County Prosecutor charged the defendant Arthur Charles Seth with one count of first degree rape of a child, and one count of second degree rape. CP I, 39-40, 46-47. The amended and second amended

informations further alleged that the rape of a child charge was “predatory” because “the perpetrator of the crime was a stranger to the victim.” CP 39, 46. The amended and second amended informations also alleged that the defendant committed the second degree rape charge against a person who “was under 15 years of age at the time of the offense.” *Id.*

The case later came on for trial before a jury with the state calling eight witnesses and the defense calling two. RP 77, 85, 93, 107, 132, 183, 206, 268, 303, 324. These witnesses testified to the facts set out in the preceding factual history. *See* Factual History. Two of the witnesses the state called in its case-in-chief were SV, AV’s sister, and Karen Vercoe, AV’s mother. RP 85-93, RP 107-132. Over defense objection, SV testified that about a year after AV spent the night with SM, AV became very upset and told her that something “very traumatic” had happened to her when she was with SM at the defendant’s apartment. RP 90-92. As a result, SV called their mother to come home and speak with AV. *Id.*

Following SV’s testimony, the state called Karen Vercoe, AV and SV’s mother. RP 107. Ms Vercoe testified over defense objection that she received the call from her daughter SV stating that AV was very upset, that in response she returned home to speak with AV, that AV then told her that something “very upsetting and traumatic” had happened the year previous when she stayed the night with SM, and that she felt ashamed and guilty

about what had happened. RP 115-119. Ms Vercoe also testified over defense objection that as a result of this conversation with AV, she called the police to make a report. RP 1118-119.

During its case-in-chief, the state also called Marcia Stover as a witness. RP 1830206. Ms Stover is a certified nurse practitioner II with a Masters Degree in nursing. RP 183-186. She has extensive training and experience in interviewing and diagnosing child victims of sexual abuse. *Id.* She testified that on May 12, 2010, she met AV in the examination room at the Arthur B. Curtis Children's Justice Center. RP 186-191. At that time, she performed a physical examination on AV in the same manner that she has performed hundreds of similar examinations under contract with the Children's Justice Center, who refers children to her for examinations as part of ongoing criminal cases. RP 7-26, 186-191.

Over continuing defense objection that she had performed a forensic examination as opposed to a true medical examination, the court allowed Ms Stover to testify that during the examination, AV told her that during the summer of 2008, she and her then friend SM went to the defendant's apartment, that during this visit the defendant pushed her down on a bed, covered her mouth, threatened to hurt her and her family, and then raped her by putting his penis in her vagina. RP 192-197. She also stated AV reported that she didn't like it and that there was a lot of pain. *Id.*

Following the close of the state's case, the defense called SM and the defendant, who both testified that SM and AV had visited the defendant at his apartment in June of 2008, but that SM had not used marijuana and that the defendant had not abused AV in any manner. RP 303-324, 324-351. The defense then rested its case, and the court instructed the jury on both alleged crimes and both alleged aggravators without objection from either party. RP 351, 354-357, 358-371.

In Instruction No. 12, the court referred to AV as the victim of the defendant's crimes. This instruction reads as follows:

INSTRUCTION NO. 12

You will also be given special verdict forms for each charge. If you find the defendant not guilty of a charge, do not use the special verdict form for that charge. If you find the defendant guilty of a charge, you will then use the special verdict form for that charge and fill in the blank with the answer "yes" or "no" according to the decision you reach. In order to answer a special verdict form "yes," you must unanimously be satisfied beyond a reasonable doubt that "yes" is the correct answer.

The special verdict forms will ask you to answer these questions:

Count 1 - Was the offense predatory?

Count 2 - Was *the victim* less than fifteen years of age at the time of the offense?

CP 107 (emphasis added).

The court also referred to AV as the victim of the defendant's crimes in the next jury instruction, which stated as follows:

INSTRUCTION NO. 13

“Predatory” means that the perpetrator of the crime was a stranger to *the victim*. “Stranger” means that *the victim* did not know the offender twenty-four hours before the offense.

CP 108 (emphasis added).

Finally, the court again referred to AV as the victim of the defendant’s crimes in the body of the second special verdict form. CP 113. This special verdict form stated as follows in the body of the text.

SPECIAL VERDICT FORM - COUNT 2

This special verdict is to be answered only if the jury finds the defendant guilty of Rape in the Second Degree as charged in Count 2.

We, the jury, return a special verdict for the offense charged in Count 2 by answering as follows:

QUESTIONS: Was *the victim* less than fifteen years of age at the time of the offense?

CP 113 (emphasis added).

Following instruction, the parties presented closing argument. RP 371-187, 387-402, 402-409. During both closing and rebuttal argument, the state argued that the jury should believe AV’s claims of rape because AV had repeated these claims to the examining physicians who had testified at the trial, including Ms Stover. RP 377-378, 403-404.

After argument, the court excused the jury for the evening and instructed them to return in the morning to begin deliberation. RP 411. They

did so, and at 2:44 the next afternoon, the jury returned verdicts of guilty on both crimes charged, along with special verdicts that the defendant had committed the rape of a child charge in a predatory manner and that he had committed the second degree rape charge against a person under 15-years of age. CP 110-113. The court later sentenced the defendant on each count to the minimum-mandatory term of 25 years to life under RCW 9.94A.507(3)(c)(ii). CP 147-177. The defendant thereafter filed timely notice of appeal. CP 169.

ARGUMENT

I. THE TRIAL COURT DENIED THE DEFENDANT A FAIR TRIAL UNDER WASHINGTON CONSTITUTION, ARTICLE 1, § 3, AND UNITED STATES CONSTITUTION, FOURTEENTH AMENDMENT, WHEN (1) IT ALLOWED AN EXPERT WITNESS WHO PERFORMED A FORENSIC EXAMINATION ON THE COMPLAINING WITNESS TO REPEAT THE ALLEGATIONS OF ABUSE THE COMPLAINING WITNESS MADE TO HER, AND (2) WHEN IT ALLOWED THE MOTHER AND SISTER OF THE COMPLAINING WITNESS TO REPEAT HER CLAIMS OF ABUSE TO THEM.

While due process does not guarantee every person a perfect trial, *Bruton v. United States*, 391 U.S. 123, 20 L.Ed.2d 476, 88 S.Ct. 1620 (1968), both our state and federal constitutions do guarantee all defendants a fair trial untainted from inadmissible, prejudicial evidence. *State v. Swenson*, 62 Wn.2d 259, 382 P.2d 614 (1963). It also guarantees a fair trial untainted by unreliable, prejudicial evidence. *State v. Ford*, 137 Wn.2d 472, 973 P.2d 472 (1999). As the following explains, one type of unreliable evidence inadmissible at trial is “hearsay” under ER 801 for which no exception allows its admission. *State v. Dahl*, 139 Wn.2d 678, 990 P.2d 396 (1999).

Under ER 801(c) hearsay is defined as “a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.” Under ER 802 hearsay is “not admissible except as provided by these rules, by other court rules, or by statute.” One of these exceptions is found in ER 803(a)(4), which allows

the admission over a hearsay exception of a “Statement for Purposes of Medical Diagnosis or Treatment.” The following examines this hearsay exception.

Under ER 803(a)(4) statements made for the purpose of medical diagnosis or treatment are considered an exception to the hearsay rule. This rule states:

(a) Specific Exceptions. The following are not excluded by the hearsay rule, even though the declarant is available as a witness:

. . .

(4) Statement for Purposes of Medical Diagnosis. Statements made for purposes of medical diagnosis or treatment and describing medical history, or past or present symptoms, pain, or sensations, or the inception or general character of the cause or external source thereof insofar as reasonably pertinent to diagnosis or treatment.

ER 803(a)(4).

Traditionally, this exception “applies only to statements ‘reasonably pertinent to diagnosis or treatment.’ Thus, statements as to causation (“I was hit by a car”) would normally be allowed under this exception, while statements as to fault (“. . . which ran a red light”) would not. 5A K. Tegland, *Washington Practice* § 367 at 224 (2d ed. 1982).

However, over the last few decades, the courts of this state have carved out an exception which allows a health care provider, under appropriate circumstances, to testify to a child’s identification of the

perpetrator of a crime against the child and a child's description of the alleged abuse. In a 1993 case, Division I of the Court of Appeals described this exception as follows:

ER 803(a)(4) allows the admittance of hearsay testimony if the statement was made for the purpose of a medical diagnosis or treatment. Normally, such testimony is not admissible if it identifies the perpetrator of a crime, but an exception has arisen to this rule when the victim is a child. *State v. Butler*, 53 Wn.App. 214, 766 P.2d 505, review denied, 112 Wn.2d 1014 (1989).

In *Butler*, this court examined at length the purposes of ER 803(a)(4) and the times when hearsay evidence concerning the identity of the perpetrator of a crime can be admitted when the victim is a child. This court ruled that such statements could be admitted as part of the doctor's testimony regarding medical treatment if the information was necessary for diagnosis and treatment. In ruling that the incriminating identification was necessary for diagnosis and treatment in that case, we reasoned that, in abuse cases, it is important for the child to identify the abuser in seeking treatment because the child may have possible psychological injuries and also may be in further danger, due to the continued presence of the abuser in the child's home. *Butler*, 53 Wn.App. at 222-23, 766 P.2d 505; see also *In re Dependency of S.S.*, 61 Wn.App. 488, 503, 814 P.2d 204, review denied, 117 Wn.2d 1011, 816 P.2d 1224 (1991).

State v. Ashcraft, 71 Wn.App. 444, 456, 859 P.2d 60 (1993).

As is apparent from the court's comments in *State v. Butler*, 53 Wn.App. 214, 766 P.2d 505 (1989), and *Ashcraft*, the justification for allowing a treatment provider to testify to the child's identification of the alleged perpetrator of abuse lies within the court's belief that part of the treatment provider's duty and function is to identify the abuser, thereby allowing the treatment provider to gauge what type of psychological damage

occurred, what type of treatment is necessary, and what steps will be necessary to prevent future abuse. As such, the courts have held that these statements, in the context of child abuse cases, fall generally within the category of those made “for the purpose of diagnosis or treatment.”

For example, in *State v. Butler, supra*, the babysitter of a 2½-year-old child took the infant to the hospital after noting several bruises about the child’s face. During the examination the child told the attending physician that his “daddy” (meaning his mother’s boyfriend) had thrown him off the bunk bed. When questioned about this, the defendant stated that the child, whom he had been watching, fell off the bed. At trial the court allowed the physician to testify to the child’s statement of who caused her injuries. Following conviction the defendant appealed, arguing that the trial court erred when it allowed the physician to testify as to what the child said.

On appeal the court of appeals first reviewed the similar fact patterns in *State v. Bouchard*, 31 Wn.App. 381, 639 P.2d 761 (1982), and *State v. Robinson*, 44 Wn.App. 611, 722 P.2d 1379 (1986). The *Butler* court stated the following concerning these cases:

In *State v. Bouchard*, 31 Wn.App. 381, 382, 639 P.2d 761, review denied, 97 Wn.2d 1021 (1982), Bouchard was convicted of indecent liberties with his 3-year-old granddaughter. The child suffered a perforated hymen. The incident occurred when the child was visiting her grandparents. *Bouchard*, at 382, 639 P.2d 761. When the child returned home, her mother noticed blood on her daughter’s body. Her mother testified that when she questioned her

daughter, she told her mother that “grandpa did it.” The attending physicians also testified that the child made similar statements to them. *Bouchard*, at 383, 639 P.2d 761.

Bouchard argued on appeal that the child’s statements to the physicians were inadmissible hearsay. *Bouchard*, at 383, 639 P.2d 761. Without analysis, the court held that “[t]he statements to the attending doctors are clearly admissible under ER 803(a)(4) as statements ‘of the cause or external source’ of the injury and as necessary to proper treatment.” *Bouchard*, at 384, 639 P.2d 761.

In *State v. Robinson*, 44 Wn.App. 611, 722 P.2d 1379, *review denied*, 107 Wn.2d 1009 (1986), the facts were very similar. Robinson was found guilty of indecent liberties with a 3-year-old girl. *Robinson*, at 615, 722 P.2d 1379. Robinson argued on appeal that admission of the child’s statements made to the nurse and doctor at the hospital where she was treated were inadmissible hearsay. *Robinson*, at 615, 722 P.2d 1379. The statements to the nurse and doctor identified Robinson as the abuser. The court disposed of Robinson’s argument in a footnote by holding that “[t]he statements to Nurse Billings and Dr. Kania are also admissible as statements made for purposes of diagnosis and treatment. ER 803(a)(4).” *Robinson*, at 616 n. 1, 722 P.2d 1379.

State v. Butler, 53 Wn.App. 219-220 (footnotes omitted).

In *Butler* the court went on to examine the application of the rule under analogous federal cases. The court noted:

This approach to child hearsay in the context of ER 803(a)(4) was further refined in *United States v. Renville*, 779 F.2d 430 (8th Cir.1985). Renville was convicted by a jury of two counts of sexual abuse of his 11-year-old stepdaughter. *Renville*, at 431. Renville argued on appeal that the trial court erred by permitting a physician to testify to statements by the victim during his examination identifying Renville as her abuser. *Renville*, at 435. Specifically, Renville argued that the hearsay exception found in Fed.R.Evid. 803(4) did not encompass statements of fault or identity made to medical personnel. *Renville*, at 435-36.

The *Renville* court pointed out that the crucial question under the rule was whether the out-of-court statement of the declarant was “reasonably pertinent” to diagnosis or treatment. *Renville*, at 436. The court began its analysis by stating the two-part test for the admissibility of hearsay statements under Fed.R.Evid. 803(4) that the court set forth in *United States v. Iron Shell*, 633 F.2d 77 (8th Cir.1980), *cert. denied*, 450 U.S. 1001, 101 S.Ct. 1709, 68 L.Ed.2d 203 (1981).

“[F]irst, the declarant’s motive in making the statement must be consistent with the purposes of promoting treatment; and second, the content of the statement must be such as is reasonably relied on by a physician in treatment or diagnosis.” *Renville*, at 436.

The test reflects the twin policy justifications advanced to support the rule. First, it is assumed that a patient has a strong motive to speak truthfully and accurately because the treatment or diagnosis will depend in part upon the information conveyed. The declarant’s motive thus provides a sufficient guarantee of trustworthiness to permit an exception to the hearsay rule. *Iron Shell*, 633 F.2d at 84. Second, we have recognized that “a fact reliable enough to serve as the basis for a diagnosis is also reliable enough to escape hearsay proscription.

State v. Butler, 53 Wn.App. at 219-220.

After reviewing these cases, the court in *Butler* went on to affirm, noting that, as in *Bouchard* and *Robinson*, the child’s statements to the treatment provider were necessary to determine the source of the injuries, and thereby determine what treatment to provide and what steps to take to protect the child from further injury.

Similarly, in *State v. Ashcraft*, *supra*, the babysitter of a 3-year-old child called the police after she discovered a number of bruises on the infant. After the initial investigation, CPS took custody of the child and had her

examined by a physician. During this examination, the physician found numerous injuries and bruises of a type commonly associated with physical abuse. The state then charged the mother with numerous counts of assault after the child told the physician that her mother had hurt her. Following conviction, the mother appealed, assigning error to the court's admission of the physician's testimony that the child told him that "My mama did it."

After reviewing the history behind ER 803(a)(4), and the recent expansion of it for child abuse cases, the court held as follows:

Similarly, in the present case, the victim lived in the accused's home. The child had been determined to be the victim of probable abuse, raising questions of possible psychological injuries, as well as questions with respect to her safety. Therefore, as in *Butler*, [the child's] identification was necessary to allow for her proper diagnosis and treatment.

State v. Ashcraft, 71 Wn.App. at 456-67.

In each of these cases just cited, *Butler*, *Robinson*, *Bouchard*, *Renville*, and *Ashcraft*, the common thread that runs throughout is the immediate need to determine the source of the injuries in order to determine what treatment is appropriate, and what steps are necessary to shield the child from further abuse. As the court notes in both *Butler* and *Renville*, "first, the declarant's motive in making the statement must be consistent with the purposes of promoting treatment; and second, the content of the statement must be consistent with the purposes of promoting treatment or diagnosis."

Butler, 53 Wn.App. at 220.

In each of these cases these two criteria were met in that the suspicious injuries had just been discovered and the placement of the child back into the home of the alleged perpetrator was an imminent possibility. By contrast, in the case at bar, unlike any of the cited cases, there was no question as to the identity of the alleged perpetrator. Neither was there a need to protect AV from the alleged perpetrator because he was a stranger to her with no access. In addition, AV had repeatedly identified the defendant to the police.

Finally, unlike the cited cases in which the children were taken to a treating physician for treatment, in this case the police specifically sent AV to Marcia Stover for the sole purpose of gaining her opinion as an expert witness for the prosecution. In other words, Marcia Stover was performing a forensic examination, not an examination for the purpose of treating the person examined. Thus, neither of the criteria required under *Butler* and *Renville* or any of the other cases cited was present in the cause currently before this court.

In this case AV did not go to Marcia Stover to get a diagnosis or to get treatment. Rather, she went to her because the police told her to in order to aid their preparation for the state's case against the defendant. Under these circumstances AV's statements to Ms Stover were not "consistent with the

purposes of promoting treatment” as is required under *Butler* and *Renville*. Neither were her statements “consistent with the purposes of promoting treatment or diagnosis” since the young woman was not going to Ms Stover for diagnosis or treatment.

Far from a medical examination intended to promote the health and well being of the young woman, the examination in this case was solely a forensic exercise in the pursuit of evidence to use against the defendant contrived by the state to circumvent the hearsay rule. To sanction the use of such evidence invites the state to preface every claim of sexual abuse with a trip to the state’s special consulting medical expert during which the child will be asked to repeat his or her prior claims of abuse to the expert, and thereby overcome the fundamental principles of the hearsay rule under the magic wand of ER 803(a)(4).

Under the facts of this case, AV’s statements to Marcia Stover as to who the abuser was and what he did do not meet the requirements of the ER 803(a)(4) exception to the hearsay prohibition. Thus, they were not admissible to prove the identity of the perpetrator and the facts of the alleged molestations. Allowing Ms Stover to repeat what AV told her had the effect of bolstering AV’s credibility in front of the jury, thereby damaging the defendant’s case.

In the case at bar, this error was exacerbated when the trial court

allowed to both SV and her mother to testify about AV's claims against the defendant. Over defense objection, SV testified that about a year after AV spent the night with SM, AV became very upset and told her that something "very traumatic" had happened to her when she was with SM at the defendant's apartment. RP 90-92. As a result, SV called their mother to come home and speak with AV. *Id.* Referring to AV's claims of rape against the defendant as a "traumatic event" did nothing to mask the substance of what was being said to the jury. As the following explains, this conclusion follows from a review of Karen Vercoe's testimony.

After SV's testimony, Karen Vercoe testified over defense objection that she received the call from her daughter SV stating that AV was very upset, that in response she returned home to speak with AV, that AV then told her that something "very upsetting and traumatic" had happened the year previous when she stayed the night with SM, and that she felt ashamed and guilty about what had happened. Ms Vercoe also testified over defense objection that, as a result of this conversation with AV, she called the police to make a report. Consequently, the state's whole purpose in eliciting this evidence from SV and Karen Vercoe was to let the jury know that AV had told them just what she had told Marcia Stover: that the defendant had raped her. Thus, the trial court erred when it allowed these three witnesses to testify to the substance of AV's claims against the defendant.

Under the doctrine of harmless error, a trial court's error of a non-constitutional magnitude such as occurred in this case warrants reversal if the defendant can show a reasonable probability that but for the error, the jury would have returned a verdict of acquittal. *State v. Hamlet*, 133 Wn.2d 314, 327, 944 P.2d 1026 (1997). As the following explains, in the case at bar the defendant can meet this burden.

In this case, AV testified to a single instance of sexual abuse that she claimed happened over a few minutes in the presence of her then best friend. Both the defendant and SM adamantly denied that this abuse occurred. Their evidence undermined AV's credibility in a case in which there was no physical evidence to support the claim of abuse.

The jury obviously had a difficult time in finding that AV's claim of abuse met the beyond a reasonable doubt standard as it deliberated almost a whole day to decide a single issue: was AV's testimony credible? Under these facts, the improper admission of any evidence would be sufficient to change what would have been an acquittal to a conviction. The defendant argues that this is precisely what happened in the case at bar. Consequently the defendant is entitled to a new trial based upon the trial court's erroneous admission of the testimony of Marcia Stover, SV, and Karen Vercoe concerning the substance of AV's claims of abuse.

II. THE TRIAL COURT VIOLATED THE DEFENDANT'S RIGHT UNDER WASHINGTON CONSTITUTION, ARTICLE 4, § 16, TO BE FREE OF JUDICIAL COMMENTS ON THE EVIDENCE WHEN IT REPEATEDLY REFERRED TO THE COMPLAINING WITNESS AS THE “VICTIM.”

Under Washington Constitution, Article 4, § 16, “[j]udges shall not charge juries with respect to matters of fact, nor comment thereon, but shall declare the law.” A statement made by the court in front of the jury constitutes an impermissible “comment on the evidence” if a reasonable juror hearing the statement in the context of the case would infer the court’s attitude toward the merits of the case, or would infer the court’s evaluation relative to the disputed issue. *State v. Hansen*, 46 Wn.App. 292, 730 P.2d 670 (1986). In *State v. Crotts*, 22 Wash. 245, 60 P. 403 (1900), the Washington Supreme Court wrote the following concerning the purpose behind this constitutional provision.

The constitution has made the jury the sole judge of the weight of the testimony and of the credibility of the witnesses, and it is a fact well and universally known by courts and practitioners that the ordinary juror is always anxious to obtain the opinion of the court on matters which are submitted to his discretion, and that such opinion, if known to the juror, has a great influence upon the final determination of the issues.

State v. Crotts, 22 Wash. at 250-51.

The courts of this state “rigorously” apply the prohibition found in Article 4, § 16, and presume prejudice from any violation of this provision.

State v. Bogner, 62 Wn.2d 247, 382 P.2d 254 (1963). In *State v. Lane*, 125

Wn.2d 825, 889 P.2d 929 (1995), the court puts the matter as follows.

Our prior cases demonstrate adherence to a rigorous standard when reviewing alleged violations of Const. Art. 4, Sec. 16. Once it has been demonstrated that a trial judge's conduct or remarks constitute a comment on the evidence, a reviewing court will presume the comments were prejudicial. *State v. Bogner*, 62 Wash.2d 247, 249, 253-54, 382 P.2d 254 (1963). In such a case, "[t]he burden rests on the state to show that no prejudice resulted to the defendant unless it affirmatively appears in the record that no prejudice could have resulted from the comment". *State v. Stephens*, 7 Wn.App. 569, 573, 500 P.2d 1262 (1972), *aff'd in part, rev'd in part*, 83 Wash.2d 485, 519 P.2d 249 (1974); *see also Bogner*, 62 Wash.2d at 253-54, 382 P.2d 254.

State v. Lane, at 838-839.

In the case at bar, the trial court commented on the evidence (the substance and veracity of AV's testimony), when it repeatedly referred to AV as the "victim" of the defendant's crimes in two jury instructions and one special verdict form. In our society today, in which the question of "victim's rights" is one of the continuing issues before the public, the court's decision to refer to the complaining witness as the "victim" clearly and unmistakably informed the jury that the court considered AV's claims against the defendant as truthful. Were this not the case, then AV would not have been the "victim."

The error in referring to AV as the "victim" of the defendant's crimes is illustrated by the constitutional principle that no witness whether a lay person or expert may give an opinion as to the defendant's guilt either

directly or inferentially “because the determination of the defendant’s guilt or innocence is solely a question for the trier of fact.” *State v. Carlin*, 40 Wn.App. 698, 701, 700 P.2d 323 (1985). In *State v. Carlin*, the court put the principle as follows:

“[T]estimony, lay or expert, is objectionable if it expresses an opinion on a matter of law or ... ‘merely tells the jury what result to reach.’” (Citations omitted.) 5A K.B. Tegland, Wash.Prac., Evidence Sec. 309, at 84 (2d ed. 1982); see *Ball v. Smith*, 87 Wash.2d 717, 722-23, 556 P.2d 936 (1976); Comment, ER 704. “Personal opinions on the guilt ... of a party are obvious examples” of such improper opinions. 5A K.B. Tegland, *supra*, Sec. 298, at 58. An opinion as to the defendant’s guilt is an improper lay or expert opinion because the determination of the defendant’s guilt or innocence is solely a question for the trier of fact. *State v. Garrison*, 71 Wash.2d 312, 315, 427 P.2d 1012 (1967); *State v. Oughton*, 26 Wash.App. 74, 77, 612 P.2d 812, *rev. denied*, 94 Wn.2d 1005 (1980).

The expression of an opinion as to a criminal defendant’s guilt violates his constitutional right to a jury trial, including the independent determination of the facts by the jury. See *Stepney v. Lopes*, 592 F.Supp. 1538, 1547-49 (D.Conn.1984).

State v. Carlin, 40 Wn.App. 701; See also *State v. Black*, 109 Wn.2d 336, 745 P.2d 12 (1987) (trial court denied the defendant his right to an impartial jury when it allowed a state’s expert to testify in a rape case that the alleged victim suffered from “rape trauma syndrome” or “post-traumatic stress disorder” because it inferentially constituted a statement of opinion as to the defendant’s guilt or innocence).

For example, in *State v. Carlin*, *supra*, the defendant was charged with second degree burglary for stealing beer out of a boxcar after a tracking

dog located the defendant near the scene of the crime. During trial the dog handler testified that his dog found the defendant after following a “fresh guilt scent.” On appeal the defendant argued that this testimony constituted an impermissible opinion concerning his guilt, thereby violating his right to have his case decided by an impartial fact-finder (the case was tried to the bench). The Court of Appeals agreed noting that “[p]articularly where such an opinion is expressed by a government official such as a sheriff or a police officer the opinion may influence the fact finder and thereby deny the defendant a fair and impartial trial.” *State v. Carlin*, 40 Wn.App. at 703.

In this case, the court referred to AV as the “victim” in two separate jury instructions and one special verdict form. The state may argue, at least in regards to the court’s use of this term in the special verdict form, that the term is not error because the jury is only supposed to use this form if it first finds the defendant guilty of the related offense. Thus, the term would be appropriate. However, any such claim is erroneous because it runs afoul of the rule that jury instructions should be viewed as a whole, which is the natural way that a jury would consider them. This is particularly true because the court read all of the instructions to the jury prior to deliberation, and the jury presumably read the instructions prior to deciding on verdicts.

As a result, the court’s use of the term “victim” constituted a comment on the evidence both in the instructions as well as in the special

verdict form. As a judicial comment on the evidence in violation of Washington Constitution, Article 4, § 16, this error is presumed prejudicial and the burden rests upon the state to prove it harmless beyond a reasonable doubt. Under the facts of this case, this error was far from harmless. This conclusion follows from the fact that (1) the entirety of the state's case turned upon the credibility of AV, and (2) the defense was able to attack her credibility through two witnesses who were present during the alleged attack (SM and the defendant) and both witnesses denied that any assault occurred. Thus, the defendant is entitled to a new trial.

CONCLUSION

The trial court's admission of inadmissible, prejudicial evidence denied the defendant a fair trial as did the trial court's comments on the credibility of the complaining witness. As a result, the defendant is entitled to a new trial.

DATED this 3rd day of February, 2012.

Respectfully submitted,



John A. Hays, No. 16654
Attorney for Appellant

APPENDIX

**WASHINGTON CONSTITUTION
ARTICLE 1, § 3**

No person shall be deprived of life, liberty, or property, without due process of law.

**WASHINGTON CONSTITUTION
ARTICLE 4, § 16**

Judges shall not charge juries with respect to matters of fact, nor comment thereon, but shall declare the law.

**UNITED STATES CONSTITUTION,
FOURTEENTH AMENDMENT**

All persons born or naturalized in the United State, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the law.

. . . .

INSTRUCTION NO. 12

You will also be given special verdict forms for each charge. If you find the defendant not guilty of a charge, do not use the special verdict form for that charge. If you find the defendant guilty of a charge, you will then use the special verdict form for that charge and fill in the blank with the answer “yes” or “no” according to the decision you reach. In order to answer a special verdict form “yes,” you must unanimously be satisfied beyond a reasonable doubt that “yes” is the correct answer.

The special verdict forms will ask you to answer these questions:

Count 1 - Was the offense predatory?

Count 2 - Was the victim less than fifteen years of age at the time of the offense?

INSTRUCTION NO. 13

“Predatory” means that the perpetrator of the crime was a stranger to the victim. “Stranger” means that the victim did not know the offender twenty-four hours before the offense.

SPECIAL VERDICT FORM - COUNT 2

This special verdict is to be answer only if the jury finds the defendant guilty of Rape in the Se3cond Degree as charged in Count 2.

We, the jury, return a special verdict for the offense charged in Count 2 by answering as follows:

QUESTION: Was the victim less than fifteen years of age at the time of the offense?

**COURT OF APPEALS OF THE STATE OF WASHINGTON,
DIVISION II**

<p>STATE OF WASHINGTON,</p> <p style="text-align:right">Respondent,</p> <p style="text-align:center">vs.</p> <p>ARTHUR SETH,</p> <p style="text-align:right">Appellant.</p>		<p>CLARK CO. NO: 10-1-00895-1</p> <p>COA NO. 42215-8-II</p> <p>AFFIRMATION OF SERVICE</p>
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Cathy Russell, states the following under penalty of perjury under the laws of Washington State. That at all times herein mentioned I was and now am a citizen of the United States and resident of the State of Washington, over the age of eighteen and competent to be a witness and make service herein.

On February 3rd, 1012, I personally e-filed and/or placed in the mail the following documents:

1. Brief of Appellant
2. Affirmation of Service

to the following:

Tony Golik
Clark County Pros Atty
1200 Franklin St.
P.O. Box 5000
Vancouver, Wa 98666-5000

Arthur C. Seth - #349134
Wash. State Corrections Center
P.O. Box 900 (R4 - A6)
Shelton, Wa 98584

Dated this 3rd Day of February, 2012 at Longview, Washington.

/s/

Cathy Russell
Legal Assistant to John A. Hays

HAYS LAW OFFICE

February 03, 2012 - 12:33 PM

Transmittal Letter

Document Uploaded: 422158-Appellant's Brief~2.pdf

Case Name: State vs. Arthur Seth

Court of Appeals Case Number: 42215-8

Is this a Personal Restraint Petition? Yes No

The document being Filed is:

Designation of Clerk's Papers Supplemental Designation of Clerk's Papers

Statement of Arrangements

Motion: ____

Answer/Reply to Motion: ____

Brief: Appellant's

Statement of Additional Authorities

Cost Bill

Objection to Cost Bill

Affidavit

Letter

Copy of Verbatim Report of Proceedings - No. of Volumes: ____

Hearing Date(s): _____

Personal Restraint Petition (PRP)

Response to Personal Restraint Petition

Reply to Response to Personal Restraint Petition

Other: _____

Sender Name: Cathy E Russell - Email: jahayslaw@comcast.net

A copy of this document has been emailed to the following addresses:

Jennifer.Casey@clark.wa.gov