

No. 47347-0-II

COURT OF APPEALS, DIVISION II  
OF THE STATE OF WASHINGTON

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STATE OF WASHINGTON,

Respondent,

vs.

**Jose Flores-Rodriguez,**

Appellant.

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Grays Harbor County Superior Court Cause No. 14-1-00346-6

The Honorable Judge Mark McCauley

**Appellant's Opening Brief**

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**TABLE OF CONTENTS**

**TABLE OF CONTENTS ..... i**

**TABLE OF AUTHORITIES ..... ii**

**ISSUES AND ASSIGNMENTS OF ERROR..... 1**

**STATEMENT OF FACTS AND PRIOR PROCEEDINGS..... 4**

**ARGUMENT..... 12**

**I. Prosecutorial misconduct and ineffective assistance denied Mr. Flores-Rodriguez a fair trial. .... 12**

A. Prosecutorial misconduct rendered Mr. Flores-Rodriguez’s jury trial fundamentally unfair. .... 13

B. Defense counsel rendered ineffective assistance. .... 21

**II. Constitutional and procedural errors violated Mr. Flores-Rodriguez’s rights..... 32**

A. The court continued the trial for improper reasons, violating the speedy trial rule..... 32

B. The Information omitted an essential element of CMIP..... 40

C. Entry of convictions for both CMIP and SEM violated the prohibition against double jeopardy..... 44

D. The court commented on the evidence, resulting in a directed verdict on the aggravating circumstance..... 47

**CONCLUSION ..... 49**

## TABLE OF AUTHORITIES

### FEDERAL CASES

<i>Strickland v. Washington</i> , 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984).....	22
<i>United States v. Bagley</i> , 772 F.2d 482 (9th Cir. 1985).....	28
<i>Viereck v. United States</i> , 318 U.S. 236, 63 S.Ct. 561, 87 L.Ed. 734 (1943) .....	16

### WASHINGTON STATE CASES

<i>Carson v. Fine</i> , 123 Wn.2d 206, 867 P.2d 610 (1994).....	23, 24
<i>In re Restraint of Brett</i> , 142 Wn.2d 868, 16 P.3d 601 (2001) .....	22
<i>In re Restraint of Cross</i> , 180 Wn.2d 664, 327 P.3d 660 (2014).....	16
<i>In re Restraint of Davis</i> , 152 Wn.2d 647, 101 P.3d 1 (2004).....	22
<i>In re Restraint of Glasmann</i> , 175 Wn.2d 696, 206 P.3d 673 (2012). 13, 14, 15, 19, 21	
<i>Kirk v. Wash. St. Univ.</i> , 109 Wn.2d 448, 746 P.2d 285 (1987) .....	17
<i>State v. A.N.J.</i> , 168 Wn.2d 91, 225 P.3d 956 (2010) .....	21
<i>State v. Adamski</i> , 111 Wn.2d 574, 761 P.2d 621 (1988) .....	37
<i>State v. Allen</i> , 176 Wn.2d 611, 294 P.3d 679 (2013), <i>as amended</i> (Feb. 8, 2013).....	42, 43
<i>State v. Berg</i> , 147 Wn. App. 923, 198 P.3d 529 (2008) .....	45
<i>State v. Blackwell</i> , 120 Wn.2d 822, 845 P.2d 1017 (1993) .....	35
<i>State v. Brush</i> , --- Wn.2d ---, 353 P.3d 213 (2015).....	47, 48, 49
<i>State v. Casteneda–Perez</i> , 61 Wn. App. 354, 810 P.2d 74 (1991) .....	15
<i>State v. Cheatam</i> , 150 Wn.2d 626, 81 P.3d 830 (2003).....	18
<i>State v. Coe</i> , 101 Wn.2d 772, 684 P.2d 668 (1984).....	17, 49
<i>State v. Dickerson</i> , 69 Wn. App. 744, 850 P.2d 1366 (1993).....	30
<i>State v. Fisher</i> , 165 Wn.2d 727, 202 P.3d 937 (2009).....	29
<i>State v. Flinn</i> , 154 Wn.2d 193, 110 P.3d 748 (2005) .....	36, 38, 39
<i>State v. Fuller</i> , 169 Wn. App. 797, 282 P.3d 126 (2012) .....	28
<i>State v. Gasteazoro-Paniagua</i> , 173 Wn. App. 751, 294 P.3d 857 (2013) 30	
<i>State v. Gasteazor-Paniagua</i> , 178 Wn.2d 1019, 312 P.3d 651 (2013).....	30
<i>State v. Greiff</i> , 141 Wn.2d 910, 10 P.3d 390 (2000).....	49
<i>State v. Hendrickson</i> , 129 Wn.2d 61, 917 P.2d 563 (1996).....	22
<i>State v. Jackman</i> , 156 Wn.2d 736, 132 P.3d 136 (2006).....	44
<i>State v. Johnson</i> , 119 Wn.2d 143, 829 P.2d 1078 (1992) (Johnson I).....	41

<i>State v. Johnson</i> , 180 Wn.2d 295, 325 P.3d 135 (2014) (Johnson II) .....	42
<i>State v. Johnston</i> , 156 Wn.2d 355, 127 P.3d 707 (2006).....	42, 43
<i>State v. Kelley</i> , 64 Wn. App. 755, 828 P.2d 1106 (1992).....	39, 40, 44
<i>State v. Kenyon</i> , 167 Wn.2d 130, 216 P.3d 1024 (2009).....	35, 36, 38, 40
<i>State v. Kier</i> , 164 Wn.2d 798, 194 P.3d 212 (2008).....	46, 47
<i>State v. Kjorsvik</i> , 117 Wn.2d 93, 812 P.2d 86 (1991).....	40
<i>State v. Levy</i> , 156 Wn.2d 709, 132 P.3d 1076 (2006).....	47, 48
<i>State v. McLean</i> , 178 Wn. App. 236, 313 P.3d 1181 (2013) <i>review denied</i> , 179 Wn.2d 1026, 320 P.3d 719 (2014).....	28
<i>State v. McNallie</i> , 120 Wn.2d 925, 846 P.2d 1358 (1993) .....	41
<i>State v. Mutch</i> , 171 Wn.2d 646, 254 P.3d 803 (2011).....	44, 45, 46, 47
<i>State v. Ramirez</i> , 46 Wn. App. 223, 730 P.2d 98 (1986).....	17, 24, 28, 31
<i>State v. Reichenbach</i> , 153 Wn.2d 126, 101 P.3d 80 (2004) .....	22, 32
<i>State v. Rundquist</i> , 79 Wn. App. 786, 905 P.2d 922 (1995).....	35
<i>State v. Russell</i> , 154 Wn. App. 775, 225 P.3d 478 (2010) <i>rev'd on other</i> <i>grounds</i> , 171 Wn.2d 118, 249 P.3d 604 (2011) (Russell II).....	29
<i>State v. Russell</i> , 171 Wn.2d 118, 249 P.3d 604 (2011) (Russell I).....	27
<i>State v. Saltarelli</i> , 98 Wn. 2d 358, 655 P.2d 697 (1982) .....	17, 23, 28, 31
<i>State v. Saunders</i> , 153 Wn. App. 209, 220 P.3d 1238 (2009) .....	37, 38, 40
<i>State v. Schimmelpfennig</i> , 92 Wn.2d 95, 594 P.2d 442 (1979).....	41, 43, 44
<i>State v. Sells</i> , 166 Wn. App. 918, 271 P.3d 952 (2012).....	18
<i>State v. Striker</i> , 87 Wn.2d 870, 557 P.2d 847 (1976) .....	36
<i>State v. Tellez</i> , 141 Wn. App. 479, 170 P.3d 75 (2007).....	42
<i>State v. Thorgerson</i> , 172 Wn.2d 438, 258 P.3d 43 (2011) .....	18
<i>State v. Walker</i> , 182 Wn.2d 463, 341 P.3d 976, <i>cert. denied</i> , 135 S.Ct. 2844 (2015).....	19
<i>State v. Wallmuller</i> , 164 Wn. App. 890, 265 P.3d 940 (2011) .....	45
<i>State v. Ward</i> , 148 Wn.2d 803, 64 P.3d 640 (2003) .....	41
<i>State v. West</i> , 139 Wn.2d 37, 983 P.2d 617 (1999) .....	22
<i>State v. Zillyette</i> , 178 Wn.2d 153, 307 P.3d 712 (2013).....	40, 42, 44

## **CONSTITUTIONAL PROVISIONS**

U.S. Const. Amend. V .....	3
U.S. Const. Amend. VI .....	1, 3, 40
U.S. Const. Amend. XIV .....	1, 3
Wash. Const. art. I, § 22.....	3, 40
Wash. Const. art. I, § 3.....	3
Wash. Const. art. IV, § 16.....	3, 47

**WASHINGTON STATUTES**

RCW 9.61.160 ..... 42

**OTHER AUTHORITIES**

1 J. WEINSTEIN & M. BERGER, EVIDENCE § 403 (1985) ..... 23  
AMERICAN BAR ASSOCIATION, STANDARDS FOR CRIMINAL JUSTICE (2d ed.  
1980) ..... 16  
CrR 3.3 ..... 2, 32, 33, 35, 36, 37, 38, 39, 40, 49  
ER 105 ..... 27, 29  
ER 201 ..... 40  
ER 401 ..... 23  
ER 402 ..... 23  
ER 403 ..... 23  
ER 404 ..... 27, 29  
MARGARET RODWAY & MARIANNE WRIGHT, EDS., DECADE OF THE  
PLAGUE: THE SOCIOPSYCHOLOGICAL RAMIFICATIONS OF SEXUALLY  
TRANSMITTED DISEASES (2013)..... 17  
*People v. Johnson*, 245 Mich. App. 243, 631 N.W.2d 1 (2001)..... 17  
*State v. Mitchell*, 568 N.W.2d 493 (Iowa 1997) ..... 17  
WPIC 2.24..... 44  
WPIC 36.03..... 43  
WPIC 36.07..... 43  
WPIC 36.07.02..... 43  
WPIC 47.06..... 41, 43  
WPIC 86.02..... 43

## **ISSUES AND ASSIGNMENTS OF ERROR**

1. Prosecutorial misconduct deprived Mr. Flores-Rodriguez of his Sixth and Fourteenth Amendment right to a fair trial.
2. The prosecutor committed flagrant, ill-intentioned, prejudicial misconduct by “testifying” to “facts” not in evidence during closing argument.
3. The prosecutor committed flagrant, ill-intentioned, prejudicial misconduct by appealing to passion and prejudice.
4. The prosecutor committed flagrant, ill-intentioned, prejudicial misconduct by shifting the burden of proof and undermining the presumption of innocence.

**ISSUE 1:** A prosecutor commits misconduct by “testifying” to “facts” not in evidence. Must the convictions here be reversed because of the prosecutor’s improper and unsupported arguments that Mr. Flores-Rodriguez (a) distributed child pornography, and (b) communicated with L.M.C. using his PlayStation?

**ISSUE 2:** A prosecutor may not seek conviction based on appeals to passion and prejudice. Did the prosecutor improperly suggest that jurors should convict because Mr. Flores-Rodriguez allegedly distributed child pornography and exposed L.M.C. to herpes?

**ISSUE 3:** A prosecutor may not shift the burden of proof or undermine the presumption of innocence. Did the prosecutor commit reversible misconduct by repeatedly arguing there was “no evidence” and “no testimony” supporting the defense theory, thereby suggesting that jurors should disbelieve Mr. Flores-Rodriguez’s testimony in the absence of corroborating evidence?

5. Mr. Flores-Rodriguez was denied his Sixth and Fourteenth Amendment right to the effective assistance of counsel.
6. Defense counsel unreasonably failed to object to inadmissible evidence that Mr. Flores-Rodriguez suffers from herpes.
7. Defense counsel unreasonably failed to request a limiting instruction regarding prejudicial evidence admitted for a limited purpose.

8. Defense counsel unreasonably allowed jurors to consider a prior allegation of sex abuse as propensity evidence.
9. Defense counsel should have requested a limiting instruction, given that the propensity evidence had already been emphasized to the jury.
10. Defense counsel unreasonably failed to object to prosecutorial misconduct during closing argument

**ISSUE 4:** An unreasonable failure to object to prejudicial and inadmissible evidence deprives an accused person of the effective assistance of counsel. Did defense counsel's unreasonable failure to object to inadmissible testimony regarding Mr. Flores-Rodriguez's herpes prejudice the defendant?

**ISSUE 5:** Defense counsel provides ineffective assistance by failing to seek an instruction limiting jurors' consideration of prior sexual misconduct, where the evidence is already emphasized for the jury. Did trial counsel's unreasonable failure to seek a limiting instruction regarding an allegation of child rape prejudice Mr. Flores-Rodriguez?

**ISSUE 6:** Failure to object to prosecutorial misconduct waives the issue for appeal unless the misconduct is flagrant and ill-intentioned. Did defense counsel provide ineffective assistance by failing to object to several instances of misconduct?

11. Mr. Flores-Rodriguez was denied his right to a speedy trial under CrR 3.3.
12. The trial judge erred by twice continuing the trial beyond Mr. Flores-Rodriguez speedy trial expiration date.
13. The trial judge erred by starting trial more than two months after the expiration of speedy trial.
14. The trial judge erroneously granted lengthy continuances based on court congestion and the state's failure to exercise diligence.
15. The trial judge failed to adequately support a finding of "good cause" for each continuance beyond speedy trial.

**ISSUE 7:** A court may not continue a case beyond the expiration of speedy trial absent good cause. Did the trial court violate CrR 3.3 by twice granting continuances based on government mismanagement

and court congestion, ultimately commencing trial more than two months after the expiration of the speedy trial period?

16. Mr. Flores-Rodriguez's conviction for Communicating with a Minor for Immoral Purposes (CMIP) violated his Sixth and Fourteenth Amendment right to an adequate charging document.

17. Mr. Flores-Rodriguez's CMIP conviction violated his state constitutional right to an adequate charging document under Wash. Const. art. I, §§ 3 and 22.

18. The charging document failed to allege a purpose of "sexual misconduct," an essential element of CMIP.

**ISSUE 8:** A charging document must include all essential elements of an offense. Did the state's failure to allege that Mr. Flores-Rodriguez communicated with a minor for immoral purposes involving "sexual misconduct" violate his constitutional right to notice?

19. Mr. Flores-Rodriguez's separate convictions for CMIP and Sexual Exploitation of a Minor ("SEM") infringed his Fifth and Fourteenth Amendment prohibition against double jeopardy.

**ISSUE 9:** Convictions for CMIP and SEM violate double jeopardy unless it is manifestly clear to the jury that the state is not seeking multiple punishments for the same offense and that each charge is based on a separate act. Did the court violate the double jeopardy prohibition by entering convictions for both CMIP and SEM, where jurors may have relied on the same act in convicting Mr. Flores-Rodriguez of both charges?

20. The trial court erred by giving Instruction No. 13.

21. Instruction No. 13 included an unconstitutional judicial comment on the evidence, in violation of Wash. Const. art. IV, § 16.

22. Instruction No. 13 violated due process by relieving the state of its burden to prove the "prolonged period of time" aggravating factor.

23. The trial court improperly told jurors that a "'prolonged period of time' means more than a few weeks."

**ISSUE 10:** A judge may not instruct jurors in a way that comments on the evidence. Did the court comment on the evidence and direct a “yes” verdict on the aggravating factor by telling jurors that a “prolonged period of time” means more than a few weeks?

### **STATEMENT OF FACTS AND PRIOR PROCEEDINGS**

1. Sheila Bouback discovered her minor daughter, L.M.C., was secretly maintaining a fake Facebook account.

Sheila Bouback found a Facebook account on her phone under an unfamiliar name. RP (1/13/15) 40-43. Her fifteen-year-old daughter L.M.C. had been using the phone. RP (1/13/15) 40-43; Ex. 2. The account belonged to “Ralee Mafie,” and showed conversations with someone named “Alan Knot.” RP (1/13/15) 119; Ex. 1. The content indicated a sexual relationship. RP (1/13/15) 43-44; Ex. 1. The messages implied that “Knot” lived with Mafie’s aunt, Sheila’s<sup>1</sup> sister Markee Bouback. RP (1/14/15) 159-60, 163, 166.

Some of the messages included nude photographs of L.M.C. RP (1/13/15) 129-30. These were sent from the Mafie account, apparently at Knot’s request. RP (1/13/15) 129-30. They included discussions between Mafie and Knot about nude Skype video calls they allegedly had. RP (1/14/15) 162-63. Sheila reported the matter to police. RP (1/13/15) 43.

L.M.C. told the investigating officer that she had set up the fake account. RP (1/13/15) 134-35; Ex. 3. She also claimed that “Knot” was actually Jose Flores-Rodriguez, Markee’s husband. RP (1/13/15) 134-35; Ex. 3. L.M.C. signed a statement asserting he had asked her to set up the Mafie account about one month earlier, then invited her to have a sexual relationship. Ex. 3; *see* RP (1/13/15) 118-21.

Sheila told the investigating officer she’d confronted Mr. Flores-Rodriguez about the Facebook conversation. RP (1/13/15) 43-44, 54-55; Ex. 3. According to Sheila’s written statement, he “denied everything.” RP (1/13/15) 59-60; Ex. 2.

2. The trial came down to a credibility contest between Mr. Flores-Rodriguez and L.M.C.

The state charged Mr. Flores-Rodriguez with communicating with a minor for immoral purposes (“CMIP”), third degree rape of a child, and sexual exploitation of a minor (“SEM”). CP 4-5. As an aggravating circumstance, the state alleged that the rape count was part of an ongoing pattern of abuse over a prolonged period of time. CP 5. After several

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<sup>1</sup>Because Sheila and Markee Bouback share the same family name, this brief refers to them by their first names for clarity. No disrespect is intended.

continuances over Mr. Flores-Rodriguez's objection, the case was tried before a jury.<sup>2</sup> RP (1/13/15) 32.

Although police seized Mr. Flores-Rodriguez's cell phone and laptop, the state presented no physical evidence at trial connecting Mr. Flores-Rodriguez to the nude photos or the Facebook accounts. RP (1/14/15) 181-82. The defense proceeded on the theory that L.M.C. had made up both accounts and fabricated the entire conversation herself. RP (1/14/15) 203-10.

Mr. Flores-Rodriguez's attorney argued that L.M.C. may have created a fantasy conversation because she was lonely.<sup>3</sup> RP (1/14/15) 205-06. L.M.C. admitted that she knew how to set up fake Facebook accounts and had done so with the Mafie account. RP (1/13/15) 118-19.

L.M.C.'s trial testimony differed from her statements to police. She told police that the inappropriate relationship began "about a month" before Sheila discovered the messages. Ex. 3; *see* RP (1/13/15) 120-128. In her testimony, by contrast, she said that they also had sex when she was

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<sup>2</sup>Additional facts concerning the charging language and these continuances appear in the relevant portions of the argument section.

<sup>3</sup> Counsel also maintained that L.M.C. had a motive to lie about having a sexual relationship with Mr. Flores-Rodriguez because she had a bad relationship with Sheila and wanted to live elsewhere. RP (1/14/15) 205-06.

only 12 years old.<sup>4</sup> RP (1/13/15) 82-83, 112-15. She admitted that she never told police about the prior incident. RP (1/13/15) 134-35.

Mr. Flores-Rodriguez objected to testimony about the alleged prior sexual contact. RP (1/13/15) 83-84. During argument outside the jury's presence, defense counsel informed the court that he first became aware of the allegations a few weeks before trial, but was "stunned" when he realized the state intended to offer testimony about it. RP (1/13/15) 83-84. Mr. Flores-Rodriguez's attorney did not make a pretrial motion to exclude evidence of the alleged prior sexual relationship. *See* RP (1/13/15) 3-33.

After hearing an offer of proof, the court ruled the testimony admissible to show a lustful disposition towards L.M.C. and "maybe kind of a common scheme or plan." RP (1/13/15) 111.

L.M.C. told the jury about the prior incident. RP (1/13/15) 112-115. Mr. Flores-Rodriguez's attorney did not request an instruction limiting the jury's use of the testimony to the purposes identified by the court. *See* RP (1/13/15) 83-90, 93-95, 105-08, 112-16.

Mr. Flores-Rodriguez testified at trial. He denied ever having sex with L.M.C. but admitted that she had once kissed him. RP (1/14/15) 176-77, 184. He also denied asking her to open a Facebook account, using the

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<sup>4</sup> Nearly three years earlier. *See* RP (1/13/15) 80, 113.

name Alan Knot, talking with her on Skype, or asking her to send nude photos. RP (1/14/15) 177.

3. The jury heard about Mr. Flores-Rodriguez's herpes.

Defense counsel knew before trial that the state might present evidence that Mr. Flores-Rodriguez suffers from herpes. Despite this, counsel did not move in limine to exclude such evidence. RP (1/13/15) 3-33, 138-39. The jury repeatedly heard testimony about the disease during the trial.

First, in describing her confrontation with him the night she discovered the Facebook messages, Sheila testified that Mr. Flores-Rodriguez told her he had herpes, and that L.M.C. would also have it if they'd really had a sexual relationship. RP (1/13/15) 55. Mr. Flores-Rodriguez's attorney did not object to this testimony. RP (1/13/15) 55.

Shortly thereafter, Markee testified that he had infected her with herpes. RP (1/13/15) 78. According to her testimony, he admitted he had the disease months after she told him she had contracted it. RP (1/13/15) 78. Defense counsel did not object. RP (1/13/15) 78.

Later, during L.M.C.'s testimony, the prosecutor asked if she had had "medical issues lately with [her] mouth." L.M.C. replied, "Yes." RP (1/13/15) 137. Defense counsel did not object. RP (1/13/15) 137. The

prosecutor then asked about the nature of the issues, and L.M.C. answered, “[t]hey’re not for sure yet.” RP (1/13/15) 137. At that point, defense counsel objected to “any further testimony,” and the court sent the jury out to hear argument. RP (1/13/15) 137-38.

The prosecutor explained that the state wished to elicit testimony that L.M.C. had recently developed sores in her mouth. RP (1/13/15) 139. The court sustained the objection, noting that any connection between the sores and Mr. Flores-Rodriguez’s herpes was too speculative, absent expert testimony. RP (1/13/15) 139-40. The court instructed the jurors to disregard “the last question and answer.” RP (1/13/15) 140. However, Mr. Flores-Rodriguez’s attorney did not move to strike all the testimony. RP (1/13/15) 140-42. Nor did counsel request an instruction that the jury disregard the entire exchange. RP (1/13/15) 140-42.

On direct examination, Mr. Flores-Rodriguez admitted he had told Sheila about having herpes when she confronted him. RP (1/14/15) 179. The prosecutor explored the issue further on cross-examination, asking whether he’d transmitted herpes to Markee and eliciting testimony that he did not know if L.M.C. had the disease. RP (1/14/15) 186. Defense counsel did not object. RP (1/14/15) 186-87.

4. The prosecutor referred in closing argument to “facts” that had not been introduced at trial.

No physical or electronic evidence linked Mr. Flores-Rodriguez to the incriminating Facebook conversations or to any Skype contact with L.M.C. Police apparently found nothing of consequence when they searched his laptop and cell phone. RP (1/14/15) 181-182, 207, 218. Mr. Flores-Rodriguez offered police his PlayStation when they seized his other electronic equipment, but they did not take it. RP (1/14/15) 181-182. Neither he nor anyone else testified that the PlayStation could access the internet. RP (1/14/15) 175-187.

Despite this, the prosecutor told the jury that the PlayStation “was something that he could have used to communicate” on the internet. RP (1/14/15) 195-96. The prosecutor later repeated the claim in her rebuttal argument. RP (1/14/15) 218. Defense counsel did not object (even though he was aware of the lack of testimony). RP (1/14/15) 196, 207, 218.

The prosecutor also argued that “no evidence” and “no testimony” indicated that L.M.C. had made up both sides of the Facebook conversation. RP (1/14/15) 217. In attacking defense counsel’s argument that Markee would likely have noticed bills if Mr. Flores-Rodriguez had used an alternate phone service to communicate with L.M.C., the prosecutor argued that the jury heard “no testimony about who paid the bills.” RP (1/14/15) 218.

At the end of her rebuttal, just before the jurors began deliberating, the prosecutor also asserted that Mr. Flores-Rodriguez “should be held accountable” in part because “he took from [L.M.C.] digital photographs that end up who knows where.” RP (1/14/15) 220. No evidence suggested that anyone other than “Alan Knot” had received the photos. Defense counsel did not object. RP (1/14/15) 220.

In concluding her rebuttal argument, the prosecutor also raised Mr. Flores-Rodriguez’s herpes as a reason to find him guilty. RP (1/14/15) 220. Immediately before asking the jury to return guilty verdicts, the prosecutor argued that “he exposed her to herpes, and he shouldn’t walk away from that.” RP (1/14/15) 220. Defense counsel did not object. RP (1/14/15) 220.

5. The court instructed jurors that “[t]he term ‘prolonged period of time’ means more than a few weeks,” and did not tell them they had to base the communication charge on acts separate and distinct from those underlying the exploitation conviction.

The Information alleged that the sex acts underlying the rape charge took place over a one-month period. CP 3-4. In her testimony, L.M.C. outlined a period of several months, interrupted by a brief trip to

Oregon.<sup>5</sup> RP (1/13/15) 120-128. The court instructed the jury that “[t]he term ‘prolonged period of time’ means more than a few weeks.” CP 10.

The court’s instructions did not require jurors to base the CMIP conviction on acts separate and distinct from those underlying the sexual exploitation conviction. CP 8, 10-11. The prosecutor did not specify in closing argument on which acts the state relied for each charge. CP 6-13; RP (1/14/15) 192-203, 215-21.

The jury returned guilty verdicts on all counts and found the aggravating circumstance present. CP 14-17; RP (1/14/15) 223-29. The court sentenced Mr. Flores-Rodriguez to an exceptional sentence of 150 months, and he timely appealed. CP 37, 53.

## **ARGUMENT**

### **I. PROSECUTORIAL MISCONDUCT AND INEFFECTIVE ASSISTANCE DENIED MR. FLORES-RODRIGUEZ A FAIR TRIAL.**

Summary of argument: The prosecutor repeatedly committed prejudicial misconduct in closing argument. Even though Mr. Flores-Rodriguez did not timely object, the misconduct was incurable by remedial instruction and thus merits reversal. In addition, trial counsel made numerous objectively unreasonable errors that prejudiced Mr. Flores-Rodriguez. Defense counsel’s deficient performance thus also denied Mr. Flores-Rodriguez a fair trial. Furthermore, the prosecutor’s misconduct exacerbated the prejudice flowing from defense counsel’s errors.

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<sup>5</sup> In her trial testimony, L.M.C. claimed that sexual contact had also occurred years earlier, when she was 12 ½. RP (1/13/15) 113.

A. Prosecutorial misconduct rendered Mr. Flores-Rodriguez's jury trial fundamentally unfair.

The prosecutor committed prejudicial misconduct in closing argument by alleging facts not admitted into evidence, appealing to jurors' passion and prejudice, and undermining the presumption of innocence. Although defense counsel did not object, a remedial instruction could not have cured the resulting prejudice. Thus, the misconduct requires reversal of Mr. Flores-Rodriguez's convictions.

1. Standard of review and governing law.

A defendant seeking a new trial based on prosecutorial misconduct must show that the prosecutor's challenged conduct was both improper and prejudicial "in the context of the record and all of the circumstances of the trial." *In re Restraint of Glasmann*, 175 Wn.2d 696, 704, 206 P.3d 673 (2012). To establish prejudice, the defendant must "show a substantial likelihood that the misconduct affected the jury verdict." *Glasmann*, 175 Wn.2d at 704.

A defendant who failed to object at trial must also show "that the misconduct was so flagrant and ill intentioned that an instruction would not have cured the prejudice." *Glasmann*, 175 Wn.2d at 704. Where a prosecutor has engaged in multiple acts of misconduct, the reviewing court does not examine each in isolation to decide whether the appellant

has shown sufficient prejudice. Instead the court looks at the cumulative effect of all the improper conduct. *Glasmann*, 175 Wn.2d at 707-12.

Prosecutorial misconduct may require reversal even where ample evidence supports the jury's verdict. *Glasmann*, 175 Wn.2d at 711-12. The focus of the reviewing court's inquiry "must be on the misconduct and its impact, not on the evidence that was properly admitted." *Glasmann*, 175 Wn.2d at 711.

2. The prosecutor improperly argued "facts" not in evidence.

A prosecutor commits misconduct by referring to facts not admitted into evidence. *Glasmann*, 175 Wn.2d at 704-706. Here, the prosecutor twice told the jury that Mr. Flores-Rodriguez could have used his PlayStation to communicate with L.M.C. via Facebook. In fact, the prosecutor went so far as to claim that Mr. Flores-Rodriguez had admitted as much. RP (1/14/15) 195-96, 218. Mr. Flores-Rodriguez never testified that he could use the device to access the internet. Nor did other evidence suggest the PlayStation had such capabilities.

This misconduct prejudiced Mr. Flores-Rodriguez.

No physical or electronic evidence tied his phone and laptop to the Knot account or the nude photos. This lack of evidence was critical to the defense theory. The prosecutor's improper statements directly undermined

this theory. The prosecutor's "testimony" supplied the jury with an explanation for the lack of physical or electronic evidence. Once implanted in the juror's minds, a curative instruction could not likely dislodge this explanation.

The prosecutor further insinuated that Mr. Flores-Rodriguez had disseminated the nude photos L.M.C. allegedly sent him. RP (1/14/15) 221. However, the record contains no evidence that anyone disseminated the pictures. They were available only to the person who controlled the Knot account.

This misconduct also prejudiced Mr. Flores-Rodriguez. Counsel for the state effectively told the jury that Mr. Flores-Rodriguez had distributed child pornography. Given our society's extreme condemnation of such conduct, an instruction had little chance of curing the remark's prejudicial effect.

3. The prosecutor improperly appealed to passion and prejudice.

A prosecutor enjoys "wide latitude to argue reasonable inferences from the evidence," but "must 'seek convictions based only on probative evidence and sound reason.'" *Glasmann*, 175 Wn.2d at 704 (quoting *State v. Casteneda-Perez*, 61 Wn. App. 354, 363, 810 P.2d 74 (1991)). Thus, a prosecutor " 'should not use arguments calculated to inflame the passions

or prejudices of the jury.’ ” *Glasmann*, 175 Wn.2d at 704 (quoting AMERICAN BAR ASSOCIATION, STANDARDS FOR CRIMINAL JUSTICE std. 3–5.8(c) (2d ed. 1980)). A prosecutor commits misconduct by “ ‘indulg[ing] in an appeal wholly irrelevant to any facts or issues in the case, the purpose and effect of which could only [be] to arouse passion and prejudice.’ ” *In re Restraint of Cross*, 180 Wn.2d 664, 723, 327 P.3d 660 (2014) (quoting *Viereck v. United States*, 318 U.S. 236, 247, 63 S.Ct. 561, 87 L.Ed. 734 (1943)).

The suggestion, unsupported by evidence, that Mr. Flores-Rodriguez had distributed child pornography amounted to an appeal to passion and prejudice. In addition, the state relied on the irrelevant but inflammatory fact that Mr. Flores-Rodriguez suffered from a sexually transmitted disease. The prosecutor did not merely refer to herpes in passing, but highlighted the disease at the close of her rebuttal argument, immediately before deliberations. In so doing, she openly and expressly invited the jury to return guilty verdicts based on the possibility that Mr. Flores-Rodriguez allegedly exposed L.M.C. to herpes. RP (1/14/15) 221.

Exposing another person to a sexually transmitted disease is not an element of, or even relevant to, any of the charged crimes. The prosecutor’s remarks invited the jury to vote guilty on an improper basis. This was misconduct.

Our courts have long recognized that evidence of a party's sexual conduct poses a serious risk of unfair prejudice. *See Kirk v. Wash. St. Univ.*, 109 Wn.2d 448, 463-64, 746 P.2d 285 (1987) (evidence of a party's abortion); *State v. Coe*, 101 Wn.2d 772, 778, 684 P.2d 668 (1984) (evidence of a defendant's sexual proclivities). Other courts have discussed the unfairly prejudicial nature of evidence regarding sexually transmitted diseases. *See, e.g., People v. Johnson*, 245 Mich. App. 243, 260-61, 631 N.W.2d 1 (2001); *State v. Mitchell*, 568 N.W.2d 493, 499 (Iowa 1997). Furthermore, "the prejudice potential of prior acts is at its highest" in sex crime cases. *State v. Ramirez*, 46 Wn. App. 223, 227, 730 P.2d 98 (1986) (citing *State v. Saltarelli*, 98 Wn. 2d 358, 363, 655 P.2d 697 (1982)).

The prosecutor's remarks prejudiced Mr. Flores-Rodriguez.

The argument expressly invited the jury to punish him for an irrelevant but emotionally charged reason.<sup>6</sup> In the face of such an inflammatory argument, a curative instruction would have been futile.

4. The prosecutor improperly shifted the burden of proof and undermined the presumption of innocence.

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<sup>6</sup>For an extensive discussion regarding public attitudes about exposing unwitting partners to sexually transmitted diseases, see MARGARET RODWAY & MARIANNE WRIGHT, EDS., *DECADE OF THE PLAGUE: THE SOCIOPSYCHOLOGICAL RAMIFICATIONS OF SEXUALLY TRANSMITTED DISEASES* (2013).

The state may not comment on a lack of defense evidence: “because the defense has no duty to present evidence,” such arguments shift the burden of proof and undermine the presumption of innocence.<sup>7</sup>” *State v. Thorgerson*, 172 Wn.2d 438, 467-68, 258 P.3d 43 (2011); *State v. Cheatam*, 150 Wn.2d 626, 652, 81 P.3d 830 (2003).

Here, the prosecutor repeatedly told the jury that Mr. Flores-Rodriguez had adduced “no evidence” and “no testimony” tending to show that L.M.C. had written both sides of the conversation. RP (1/14/15) 217-218.

This was improper. Mr. Flores-Rodriguez testified that he did not use the Knot account. His testimony provided evidence that someone else with the same knowledge, possibly L.M.C., wrote the disputed messages. The prosecutor’s argument thus mischaracterized the testimony: at least some evidence supported the claim that L.M.C. wrote both sides of the conversation.

Furthermore, the argument implied that the jury could not credit Mr. Flores-Rodriguez’s defense unless he presented evidence to support it. This was improper. Given that the trial came down to a credibility contest

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<sup>7</sup> A prosecutor may “point out a lack of evidentiary support for the defendant’s theory of the case” or “state that certain testimony is not denied, without reference to who could have denied it.” *State v. Sells*, 166 Wn. App. 918, 930, 271 P.3d 952 (2012), *Thorgerson*, 172 Wn.2d at 467.

between Mr. Flores-Rodriguez and L.M.C., the misconduct also prejudiced Mr. Flores-Rodriguez.<sup>8</sup>

5. The prosecutor's flagrant and ill-intentioned misconduct likely affected the trial's outcome.

Several instances of the prosecutorial misconduct just described merit reversal standing alone. The cumulative impact of the prosecutor's improper argument, furthermore, denied Mr. Flores-Rodriguez a fair trial. That is, the combined effect of the prosecutor's various acts of misconduct posed a substantial likelihood of affecting the verdict, and no remedial instruction could have cured the resulting prejudice.

Courts reviewing prosecutorial misconduct look to the overall effect of all the improper conduct. *Glasmann*, 175 Wn.2d at 707-12. The inquiry does not focus on the prosecutor's subjective intent, but on whether the misconduct prejudiced the defendant and whether a timely objection and remedial instruction could have cured it. *State v. Walker*, 182 Wn.2d 463, 478, 341 P.3d 976, *cert. denied*, 135 S.Ct. 2844 (2015).

The lack of evidence tying Mr. Flores-Rodriguez's cell phone or laptop to the Knot account or to the nude photos was the lynchpin of the defense theory that L.M.C. had written the whole conversation. The state's

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<sup>8</sup> The same is true regarding the prosecutor's argument that the defense produced no evidence that Markee would have noticed had Mr. Flores-Rodriguez used an additional

(Continued)

improper use of “facts” that were not admitted likely misled the jury into thinking Mr. Flores-Rodriguez used the PlayStation to communicate on the internet. This undermined a key element of the defense.

The prosecutor’s improper suggestion that Mr. Flores-Rodriguez should have presented more evidence in support of his defense exacerbated the resulting prejudice. In the credibility contest between Mr. Flores-Rodriguez and L.M.C., these insinuations may well have tipped the balance in the state’s favor. An instruction from the court could not plausibly have caused the jurors to disregard the prosecutor’s suggestion.

An instruction from the court would have similarly had little effect with respect to either the prosecutor’s invitation to punish Mr. Flores-Rodriguez for exposing L.M.C. to herpes or her insinuation that Mr. Flores-Rodriguez had distributed child pornography. Even a strongly-worded admonishment could hardly have neutralized jurors’ visceral emotional reactions to these appeals to passion and prejudice.

The overall effect of the prosecutor’s improper remarks posed a substantial likelihood of affecting the verdicts. The misconduct was so inflammatory, and improperly undermined such a crucial part of Mr. Flores-Rodriguez’s defense, that a curative instruction would have been

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communications device. RP (1/14/15) 217-218.

futile. The remedy is to reverse the convictions and remand for a new trial. *Glasmann*, 175 Wn.2d at 714.

B. Defense counsel rendered ineffective assistance.

Trial counsel's deficient performance also denied Mr. Flores-Rodriguez a fair trial. Specifically, counsel (1) failed to seek the exclusion of irrelevant and unfairly prejudicial evidence; (2) failed to request a limiting instruction concerning evidence of Mr. Flores-Rodriguez's alleged prior sexual misconduct with L.M.C.; and (3) failed to object to the prosecutor's improper, inflammatory, and highly prejudicial closing argument.

1. Standard of review and governing law.

Appellate courts review claims of ineffective assistance of counsel de novo. *State v. A.N.J.*, 168 Wn.2d 91, 109, 225 P.3d 956 (2010). To obtain relief on an ineffective assistance claim, a defendant must show "that (1) his counsel's performance fell below an objective standard of reasonableness and, if so, (2) that counsel's poor work prejudiced him." *A.N.J.*, 168 Wn.2d at 109. Although courts apply "a strong presumption that defense counsel's conduct is not deficient," a defendant rebuts that presumption if "no conceivable legitimate tactic explain[s] counsel's performance." *State v. Reichenbach*, 153 Wn.2d 126, 130, 101 P.3d 80

(2004). Even where none of several deficiencies in defense counsel's performance denies a defendant the effective assistance of counsel standing alone, the errors' cumulative effect may. *See, e.g., In re Restraint of Brett*, 142 Wn.2d 868, 882-83, 16 P.3d 601 (2001).

Defense counsel's failure to object to evidence of prior misconduct may constitute deficient performance. *State v. Hendrickson*, 129 Wn.2d 61, 78-79, 917 P.2d 563 (1996). Counsel may also render ineffective assistance by failing to move in limine to exclude evidence of a defendant's prior conduct. *See State v. West*, 139 Wn.2d 37, 40, 983 P.2d 617 (1999).

To be entitled to relief on these grounds, an appellant must show that (1) defense counsel's failure to object fell below prevailing professional norms, (2) the trial court would likely have sustained a timely objection, and (3) the defendant had a reasonable probability of obtaining a more favorable trial result absent the challenged evidence. *In re Restraint of Davis*, 152 Wn.2d 647, 714, 101 P.3d 1 (2004). A "reasonable probability" is one "sufficient to undermine confidence in the outcome." *Davis*, 152 Wn.2d at 673 (quoting *Strickland v. Washington*, 466 U.S. 668, 694, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984)).

2. Defense counsel unreasonably failed to seek exclusion of the irrelevant and unfairly prejudicial herpes evidence.

No conceivable tactical consideration explains defense counsel's failure to move in limine to exclude the herpes evidence.<sup>9</sup> The trial court would likely have sustained an objection to the testimony.

Absent some competent evidence that L.M.C. had contracted the disease, Mr. Flores-Rodriguez's herpes had no tendency to make more or less probable any matter at issue in the case. ER 401 and 402 thus rendered the testimony inadmissible.

Even were the evidence somehow relevant, the trial court would surely have sustained a timely objection under ER 403 because its potential for unfair prejudice substantially outweighed whatever probative value it may have had. *See Saltarelli*, 98 Wn.2d at 362. "[E]vidence may be unfairly prejudicial under rule 403 if it appeals to the jury's sympathies, arouses its sense of horror, provokes its instinct to punish, or 'triggers other mainsprings of human action.'" *Carson v. Fine*, 123 Wn.2d 206, 223, 867 P.2d 610 (1994) (quoting 1 J. WEINSTEIN & M. BERGER, EVIDENCE § 403[03], at 403–36 (1985)). As discussed above, sex crime

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<sup>9</sup> Mr. Flores-Rodriguez could only have benefited from admission of evidence regarding his herpes if he could show that (1) L.M.C. did not have the disease and (2) she would likely have contracted it had she had the kind of sexual relationship with Mr. Flores-Rodriguez that the state alleged. Establishing either proposition would have required expert medical testimony. Defense counsel made no effort to offer competent evidence regarding herpes transmission, however, or to show that L.M.C. did not have the disease. Thus, the only conceivable tactical reason to let the jury to hear such evidence—to support an argument that the jury should doubt the charges' truth because L.M.C. did not have herpes—could not possibly have motivated defense counsel's omission.

cases pose the greatest risk for unfair prejudice from the admission of prior sexual misconduct. *Saltarelli*, 98 Wn.2d at 363; *Ramirez*, 46 Wn. App. at 227.

Mr. Flores-Rodriguez's alleged transmission of herpes to Markee without her knowledge plainly tended to make Mr. Flores-Rodriguez appear contemptible, to arouse sympathy for Markee and L.M.C., and to provoke the jurors' "instinct to punish." *Carson*, 123 Wn.2d at 223. Even assuming the state could have articulated some basis for its relevance, the court would have granted a timely motion to exclude the testimony, or sustained a timely objection to it. But defense counsel made no such motion, and did not object even when the prosecutor delved into the topic in depth.<sup>10</sup> RP (1/13/15) 77-78.

Defense counsel also rendered ineffective assistance by failing to (1) move in limine to exclude any testimony regarding L.M.C.'s alleged medical problems with her mouth or (2) request an instruction that the jury disregard that testimony entirely after the state elicited it. Without a test result or medical opinion, the testimony amounted to pure speculation, and it obviously tended to undermine Mr. Flores-Rodriguez's defense.

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<sup>10</sup> Nor did Mr. Flores-Rodriguez's attorney object to or move in limine to exclude Sheila's herpes testimony. RP (1/13/15) 55.

Mr. Flores-Rodriguez's attorney knew prior to trial that the state could seek to elicit such testimony. RP (1/13/15) 138-39. Counsel should have objected outside the presence of the jury before L.M.C. testified. By doing so could defense counsel have prevented the prosecutor from planting the idea that L.M.C. had contracted herpes from Mr. Flores-Rodriguez. The attorney simply failed to do so.

Nor did defense counsel timely object when the prosecutor asked about L.M.C.'s medical issues on redirect, even though the questions fell far outside the scope of cross-examination. RP (1/13/15) 132-35, 137. Counsel did belatedly object once the prosecutor began to explore the issue in front of the jury; however, the damage had already been done.

Once the court sustained the objection, furthermore, Mr. Flores-Rodriguez's attorney failed to ask the court to strike the testimony in its entirety and instruct the jury to disregard all of it. Instead, the court sua sponte instructed the jury to disregard only the final question and answer, leaving the jurors free to consider L.M.C.'s testimony that she had recently developed "medical issues . . . with [her] mouth." RP (1/13/15) 137. The implication that Mr. Flores-Rodriguez had transmitted herpes to L.M.C. could hardly have been clearer.

The court would almost certainly have granted a timely motion to exclude such testimony: in sustaining defense counsel's belated objection,

the court expressly recognized that a connection between the alleged sores and herpes was too speculative. RP (1/13/15) 139. Similarly, the court's instruction to disregard some of the testimony indicates that the judge would have granted a request for a thorough curative instruction. Had defense counsel performed competently, then, he could have prevented the jury from hearing any of the irrelevant and unfairly prejudicial testimony concerning Mr. Flores-Rodriguez's herpes.

Absent the herpes testimony, Mr. Flores-Rodriguez had a reasonable probability of obtaining a more favorable result. The herpes testimony tended to undermine his credibility, evoke sympathy for L.M.C., and provoke a strong negative emotional reaction among the jurors.

The trial came down to a credibility contest—Mr. Flores-Rodriguez's only chance of acquittal was if his denial created a reasonable doubt regarding L.M.C.'s testimony. The jury may well have relied on speculation that L.M.C. had contracted herpes in crediting her version of events.

The suggestion that Mr. Flores-Rodriguez had transmitted herpes to L.M.C., furthermore, likely aroused a strong emotional response from the jury. Jurors may well have decided the case based on sympathy for L.M.C., disgust at Mr. Flores-Rodriguez's alleged conduct, or the instinct

to punish, rather than a reasoned evaluation of the evidence. The prosecutor then exacerbated this risk of unfair prejudice, telling the jury immediately before deliberations that Mr. Flores-Rodriguez “exposed [L.M.C.] to herpes, and he shouldn’t walk away from that.” RP (1/14/15) 221.

Mr. Flores-Rodriguez’s trial counsel could and should have excluded the inflammatory and damaging herpes testimony from the trial. The admission of that evidence, and the prosecutor’s subsequent improper exploitation of it, posed a likelihood of affecting the verdict substantial enough to undermine confidence in the trial’s outcome.

3. Defense counsel unreasonably failed to request a limiting instruction regarding the alleged prior sexual relationship.

Mr. Flores-Rodriguez’s attorney also rendered ineffective assistance by failing to request a limiting instruction on L.M.C.’s allegation that she’d had sex with Mr. Flores-Rodriguez when she was 12. The court had a duty to give such an instruction if requested. *State v. Russell*, 171 Wn.2d 118, 122-24, 249 P.3d 604 (2011) (Russell I) (interpreting ER 105, 404(b)). Without it the jury may have improperly used the testimony as propensity evidence.

No conceivable legitimate tactical consideration justifies this failure. Unlike most circumstances where counsel elects to forego a proper

limiting instruction, a limiting instruction here would not have emphasized the damaging evidence. *Cf. State v. McLean*, 178 Wn. App. 236, 247, 313 P.3d 1181 (2013) *review denied*, 179 Wn.2d 1026, 320 P.3d 719 (2014) (“[I]t can be a legitimate trial tactic to withhold an objection to avoid emphasizing inadmissible evidence.”)

When the state broached this inflammatory topic, the court sent the jury out for a long period to hear argument on Mr. Flores-Rodriguez’s objection. RP (1/13/15) 83-112. The state then explored the issue at length immediately after the jurors returned. RP (1/13/15) 112-117. No instruction could have emphasized the testimony more than this series of events already had. Defense counsel could thus not reasonably have decided to forego a limiting instruction in order to avoid highlighting it.

Such classic propensity evidence poses a high risk of unfair prejudice: jurors will likely make the understandable but legally impermissible inference that, if the defendant did it before, he probably did it this time, too. *See Saltarelli*, 98 Wn.2d at 363; *State v. Fuller*, 169 Wn. App. 797, 830-31, 282 P.3d 126 (2012); *Ramirez*, 46 Wn. App. at 227. *See also United States v. Bagley*, 772 F.2d 482, 488 (9th Cir. 1985). Such evidence poses the highest potential for unfair prejudice in sex crime cases. *Saltarelli*, 98 Wn.2d at 363; *Ramirez*, 46 Wn. App. at 227. When a jury hears lustful disposition evidence in a sex offense case, the lack of a

limiting instruction is prejudicial enough to require reversal. *State v. Russell*, 154 Wn. App. 775, 782-86, 225 P.3d 478 (2010) *rev'd on other grounds*, 171 Wn.2d 118, 249 P.3d 604 (2011) (Russell II).

Here, the trial court allowed the testimony under ER 404(b) for a limited purpose: to show a lustful disposition towards L.M.C. and “maybe kind of a common scheme or plan.” RP (1/13/15) 111. Thus, had Mr. Flores-Rodriguez’s attorney requested an instruction limiting the jury’s use of the evidence to those purposes, the court would have had a duty to give it. ER 105, 404(b); *Russell II*, 171 Wn.2d at 122-24.

Defense counsel inexplicably failed to request a limiting instruction on the prior sex allegations. The omission gave the jury carte blanche to use the testimony as improper propensity evidence. *See State v. Fisher*, 165 Wn.2d 727, 766, 202 P.3d 937 (2009) (“Failure to request a limiting instruction renders the evidence available to both parties for all purposes.”).

4. Defense counsel unreasonably failed to object to the highly prejudicial prosecutorial misconduct.

Mr. Flores-Rodriguez’s trial attorney also deprived him of the right to effective assistance of counsel by failing to object to the prosecutor’s improper and inflammatory closing argument. Although the prosecutor’s misconduct itself merits reversal in this case, defense counsel’s failure to

object also supports an ineffective assistance claim, providing an independent basis for reversal. *See State v. Gasteazor-Paniagua*, 173 Wn. App. 751, 760, 294 P.3d 857, 862, review denied sub nom. *State v. Gasteazor-Paniagua*, 178 Wn.2d 1019, 312 P.3d 651 (2013); *State v. Dickerson*, 69 Wn. App. 744, 748, 850 P.2d 1366 (1993).

The lack of evidence tying Mr. Flores-Rodriguez's phone or laptop to the Facebook conversations was key to the defense theory of the case. Defense counsel plainly knew that the jury had heard no evidence suggesting Mr. Flores-Rodriguez could have used his PlayStation to communicate with L.M.C. RP (1/14/15) 207. Yet he failed to object or request a remedial instruction when the prosecutor told jurors that Mr. Flores-Rodriguez had said the device could serve such a purpose. Thus, no legitimate tactical consideration explains this failure.

Because no evidence about the PlayStation's capabilities appears in the record, the court would presumably have sustained a timely objection. Defense counsel could also have obtained an instruction reminding jurors to disregard the prosecutor's unsupported argument.

Counsel's failure to object likely affected the verdict. The lack of evidence tying Mr. Flores-Rodriguez's phone or laptop to the Knot account or to any nude photos provided the best support for the defense

theory that L.M.C. had written both sides of the conversation. Thus, the prosecutor's misstatement undermined a crucial part of the defense.

Furthermore, Mr. Flores-Rodriguez's attorney had no conceivable tactical reason to refrain from objecting to the prosecutor's inflammatory argument that Mr. Flores-Rodriguez "exposed L.M.C. to herpes, and he shouldn't walk away from that." RP (1/14/15) 221. The argument expressly invited the jury to punish Mr. Flores-Rodriguez based on an irrelevant consideration, and was highly inflammatory given public attitudes about sexually transmitted diseases. Evidence of such misconduct poses the greatest risk of unfair prejudice in sex crime cases. *Saltarelli*, 98 Wn.2d at 363; *Ramirez*, 46 Wn. App. at 227. This is especially true here.

For the same reasons, Mr. Flores-Rodriguez's attorney had no conceivable tactical reason to refrain from objecting to the prosecutor's remark that the pictures L.M.C. sent "ended up who knows where." RP (1/14/15) 220-21. No evidence suggested that the pictures ended up anywhere (other than the "Knot" account), and the remark was obviously inflammatory given public attitudes about distributing child pornography.

Even if each of these errors standing alone did not prejudice Mr. Flores-Rodriguez, the cumulative effect denied him the effective assistance of counsel. Defense counsel failed to keep inflammatory, inadmissible evidence out of the trial, allowed the prosecutor to exploit the

evidence by inviting jurors to decide the case on an improper basis, sat silently while the prosecutor improperly undermined the defense theory, and allowed the jury free reign to use L.M.C.'s allegation of a prior sexual relationship as propensity evidence.

Given that the trial came down to a credibility contest between Mr. Flores-Rodriguez and L.M.C., the probability of a better outcome absent these errors is high enough to undermine confidence in the result obtained. The remedy is to vacate the convictions and remand for further proceedings. *Reichenbach*, 153 Wn.2d at 137.

## **II. CONSTITUTIONAL AND PROCEDURAL ERRORS VIOLATED MR. FLORES-RODRIGUEZ'S RIGHTS.**

Summary of argument: Numerous procedural defects and constitutional violations require reversal of Mr. Flores-Rodriguez's convictions. First, the court violated the time-for-trial rule by improperly granting the state's continuance requests. Second, the Information omitted an essential element of CMIP. Third, entry of convictions on for both CMIP and SEM violated the prohibition against double jeopardy. Finally, one of the court's instructions commented on the evidence, relieving the state of its burden of proving the aggravating circumstance.

A. The court continued the trial for improper reasons, violating the speedy trial rule.

The court violated the time-for-trial rule, CrR 3.3, by granting continuances for improper reasons. The court also repeatedly failed to

make an adequate record supporting its good cause findings, and did not acknowledge its duty to ensure a timely trial.

1. Supplemental facts: the trial court repeatedly delayed trial over Mr. Flores-Rodriguez's objections.

The trial court arraigned Mr. Flores-Rodriguez on September 2, 2014, and he remained in custody throughout the proceedings. Request for Trial filed 9/3/14, Supp. CP; RP (10/6/14) 2. The court originally set the trial for October 28, 2014. Notice of Trial Date filed 9/3/14, Supp. CP; RP (10/13/14) 4.

On October 13, 41 days into the 60-day time-for-trial period specified by CrR 3.3, the state moved to continue trial because the prosecutor had scheduled another case for October 28 and did not think a deputy prosecutor could prepare for trial in time. RP (10/13/14) 4. The state's written motion alleges that the "parties need additional time to speak with the witnesses," CP 2-3, but the prosecutor did not mention this reason at the hearing. RP (10/13/14) 4-7. Mr. Flores-Rodriguez objected and ultimately refused to sign the order granting the continuance. Order for Continuance of Trial Date filed 10/13/14, Supp. CP; RP (10/13/14) 4.

The prosecutor asked the court to continue the trial until December 2<sup>nd</sup>, more than a month after the original date. According to the prosecutor, 38 other cases were already set for trial on the only earlier date available.

RP (10/13/14) 5-6. The court granted the continuance,<sup>11</sup> but did not expressly state the reason for finding good cause. RP (10/13/14) 6. The written order contains a boilerplate provision reciting that good cause had been shown, but does not disclose the reason. Order for Continuance of Trial Date filed 10/13/14, Supp. CP.

On November 17, the state asked for a second continuance because the prosecutor had meanwhile scheduled three other trials for December 2, and because she needed to attend “training for newly elected officials.” RP (11/17/14) 10-11. Mr. Flores-Rodriguez again objected to any continuance and ultimately refused to sign the order. Order for Continuance of Trial Date filed 11/17/14, Supp. CP; RP (11/17/14)11-12.

The court found that prosecutor’s training constituted good cause and continued the trial again. RP (11/17/14) 13. Due to the court administrator’s absence, conflicts with other cases already set for trial, and the prosecutor’s scheduling conflicts, the court did not set a new trial date on the record at the hearing. RP (11/17/14) 12-14. Later, the court entered an order setting a trial date of January 6, 2015, more than two months

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<sup>11</sup>The court set the matter for a hearing on November 3, 2014, to see if the case could be tried earlier, but ultimately struck the hearing because no earlier date was available. RP (10/13/14) 6; RP (Nov. 3, 2014) 8.

beyond the original CrR 3.3 deadline.<sup>12</sup> Order for Continuance of Trial Date filed 11/17/14, Supp. CP; RP (1/6/15) 27-29.

Trial commenced on January 13, 133 days after arraignment. RP (1/13/15) 32; RP (1/14/15) 223-29. Mr. Flores-Rodriguez never requested or agreed to any continuance.

## 2. Standard of review and governing law.

Appellate courts review alleged violations of CrR 3.3 de novo. *State v. Kenyon*, 167 Wn.2d 130, 136, 216 P.3d 1024 (2009). A trial court's decision to grant a continuance is reviewed for abuse of discretion. *Kenyon*, 167 Wn.2d at 136. The court abuses its discretion if its "decision is manifestly unreasonable, or is exercised on untenable grounds, or for untenable reasons." *State v. Blackwell*, 120 Wn.2d 822, 830, 845 P.2d 1017 (1993). A court acts

on untenable grounds if its factual findings are unsupported by the record . . . , for untenable reasons if it has used an incorrect standard, or the facts do not meet the requirements of the correct standard . . . [and acts] unreasonably if its decision is outside the range of acceptable choices given the facts and the legal standard.

*State v. Rundquist*, 79 Wn. App. 786, 793, 905 P.2d 922 (1995).

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<sup>12</sup> On January 6, the court *sua sponte* continued the trial for one week. RP (1/6/15) 27-30. The court justified the delay based on flooding and school closures apparently occurring in the county at the time, in order "to assure that the defendant receives a fair trial with an impartial jury from the entire county." RP (1/6/15) 27-30.

CrR 3.3 aims to protect the constitutional right to a speedy trial, and courts must strictly construe it to protect that right: “ ‘unless a strict rule is applied, the right to a speedy trial[,] as well as the integrity of the judicial process, cannot be effectively preserved.’ ” *Kenyon*, 167 Wn.2d at 136 (quoting *State v. Striker*, 87 Wn.2d 870, 877, 557 P.2d 847 (1976)). The trial court has a duty to ensure compliance with the rule. CrR 3.3(a)(1); *Kenyon*, 167 Wn.2d at 136.

Where, as here, the defendant awaits trial in jail, the court must commence the trial within 60 days of arraignment, or within 30 days of any period of time properly excluded from those 60 days.<sup>13</sup> CrR 3.3(b)(1), (5), (c)(1); *Kenyon*, 167 Wn.2d at 136. A trial court may grant a continuance if “such continuance is required in the administration of justice and the defendant will not be prejudiced in the presentation of his or her defense.” CrR 3.3(f)(2). When granting a continuance, “[t]he court must state on the record or in writing the reasons for the continuance.” CrR 3.3(f)(2).

Court congestion does not generally provide a valid reason to continue a trial. *State v. Flinn*, 154 Wn.2d 193, 200-201, 110 P.3d 748 (2005). A court granting a continuance primarily due to congestion “must

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<sup>13</sup> Such excluded periods include properly granted continuances. CrR 3.3(e)(2).

record details of the congestion, such as how many courtrooms were actually in use at the time of the continuance.” *Flinn*, 154 Wn.2d at 200.

A continuance necessitated by the state’s failure to exercise due diligence is improper even if the defendant fails to show any specific prejudice. *State v. Adamski*, 111 Wn.2d 574, 579, 761 P.2d 621 (1988). Thus, the state’s failure to timely assign or reassign the case to a prosecutor does not justify continuing a trial. *State v. Saunders*, 153 Wn. App. 209, 219, 220 P.3d 1238 (2009).

3. The delays violated the time-for-trial rule.

Here, the lengthy continuances were necessitated by court congestion and the state’s failure to exercise diligence. At argument on the first motion, the prosecutor justified the request solely on the grounds that she had another case set for trial the same week and did not think a deputy prosecutor could prepare for trial in time.<sup>14</sup> RP (10/13/14) 4.

Based on the prosecutor’s request, the court continued the case for more than a month (from October 28 to December 2). RP (10/13/14) 4-6. The court did not explicitly acknowledge its duty under CrR 3.3(a)(1) to

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<sup>14</sup> In her written motion, the prosecutor justified her first request in part on the ground that the case was complex and the parties needed additional time to speak with witnesses. CP 2-3. At the hearing on the motion, however, the prosecutor did not mention these reasons. Furthermore, she admitted that she intended to call only two or three witnesses, all civilians.

(Continued)

ensure a timely trial. RP (10/13/14) 6-7; *see Saunders*, 153 Wn. App. at 217-18. Nor did the court articulate the reason it found good cause for the continuance on the record, as CrR 3.3(f)(2) requires. RP (10/13/14) 6-7; *see Kenyon*, 167 Wn.2d at 131-32.

Furthermore, the length of the first delay resulted from court congestion. The court did not “record details of the congestion, such as how many courtrooms were actually in use at the time of the continuance.” *Flinn*, 154 Wn.2d at 200.

The trial court acted on untenable grounds or for untenable reasons, and thus abused its discretion in granting the first continuance. The charges must be dismissed. CrR 3.3(h); *Kenyon*, 167 Wn.2d at 131; *Saunders*, 153 Wn. App. at 221.

The second continuance also violated Mr. Flores-Rodriguez’s right to a speedy trial. The state requested the second continuance because the prosecutor had in the meantime set three trials for the rescheduled trial date. In addition, she wished to attend a training session. RP (11/17/14)

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RP (10/13/14) 6. *See also* Notice of Trial Date Setting, Supp. CP – (estimating trial would last two and a half days).

10-11. There is no indication the state tried to reassign the case to another prosecutor.<sup>15</sup>

The court found good cause based on the need to accommodate the prosecutor's training. RP (11/17/14) 13. However, the court did not merely continue the case one or two weeks. Instead, due to court congestion and the prosecutor's schedule, the court ultimately reset the trial date to January 6, 2015, more than thirty days beyond the reset December 2 trial date and more than two months beyond the original CrR 3.3 deadline. Order for Continuance of Trial Date filed 11/17/14, Supp. CP; RP (11/17/14) 12-14; RP (1/13/15) 27-29. Again, the court did not "record details of the congestion, such as how many courtrooms were actually in use at the time of the continuance." *Flinn*, 154 Wn.2d at 200.

The record does not show that the government "responsibly managed its resources in terms of the available deputy prosecutors, courtrooms and judges." *State v. Kelley*, 64 Wn. App. 755, 767, 828 P.2d 1106 (1992). The state was granted more than a brief continuance and

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<sup>15</sup> Although she had previously told the court it would take too long for a deputy to prepare for trial, she now represented that it would actually prejudice the state to reassign the case at all. Compare RP (10/13/14) 4 with RP (11/17/14) 10-11.

admittedly made no effort to reassign the case to a deputy prosecutor.<sup>16</sup> *Cf. Kelley*.

The court thus also abused its discretion in granting the second continuance. The remedy is to dismiss the charges under CrR 3.3(h). *Kenyon*, 167 Wn.2d at 131; *Saunders*, 153 Wn. App. at 221.

B. The Information omitted an essential element of CMIP.

Appellate courts review claims that the information omitted an essential element de novo. *State v. Zillyette*, 178 Wn.2d 153, 158-59, 307 P.3d 712 (2013). A defendant may challenge the charging document for the first time on appeal. *See Zillyette*, 178 Wn.2d at 161.

The state and federal constitutions require the government to “ ‘afford notice to an accused of the nature and cause of the accusation against him.’ ” *Zillyette*, 178 Wn.2d at 158 (quoting *State v. Kjorsvik*, 117 Wn.2d 93, 97, 812 P.2d 86 (1991)); U.S. Const. Amend. VI; Wash. Const. art. I, § 22. To comport with these requirements, the Information must include all essential elements of the charged crimes. *Zillyette*, 178 Wn.2d at 158. “An ‘essential element is one whose specification is necessary to establish the very illegality of the behavior’ charged.” *State v. Ward*, 148

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<sup>16</sup>Furthermore, this court may take notice that Grays Harbor is not a “heavily populated county,” where other available prosecutors would likely already be in trial, thus necessitating further delays. *Kelley*, 64 Wn. App. at 767; ER 201.

Wn.2d 803, 811, 64 P.3d 640 (2003) (quoting *State v. Johnson*, 119

Wn.2d 143, 147, 829 P.2d 1078 (1992) (Johnson I)).

1. The Information failed to allege that Mr. Flores-Rodriguez communicated with L.M.C. for purposes of sexual misconduct, a non-statutory element of CMIP.

A charge of CMIP requires proof that the underlying “immoral purpose” involves sexual misconduct. *State v. McNallie*, 120 Wn.2d 925, 932-33, 846 P.2d 1358 (1993). The sexual misconduct requirement is an essential element of the charge, necessary to establish the very illegality of the behavior. *Ward*, 148 Wn.2d at 811; *see also* 11 Wash. Prac., Pattern Jury Instr. Crim. WPIC 47.06 (3d Ed), CP 8. Certain moral codes may condemn sabbath breaking or drug use, for example, but inviting a minor to engage in those activities does not violate the statute. *McNallie*, 120 Wn.2d at 930-31; *State v. Schimmelfennig*, 92 Wn.2d 95, 102, 594 P.2d 442 (1979).

Here, the Information alleges that Mr. Flores-Rodriguez “did communicate with” L.M.C. “for immoral purposes.” CP 4. The Information does not allege that the purposes involved sexual misconduct. CP 4. The Information thus failed to allege an essential element of the crime. *McNallie*, 120 Wn.2d at 930-31. This defect rendered the charging

document constitutionally deficient.<sup>17</sup> *Zillyette*, 178 Wn.2d at 158. Mr. Flores-Rodriguez’s CMIP conviction must be reversed and the charge dismissed without prejudice. *Id.*

2. The “sexual misconduct” requirement is an essential element that must be included in the Information because it is not merely definitional.

Essential elements must be set forth in the Information. *Zillyette*, 178 Wn.2d at 158. However, terms that are merely definitional need not be included in a charging document. *State v. Johnson*, 180 Wn.2d 295, 302, 325 P.3d 135 (2014) (Johnson II). This is so even for requirements imposed on constitutional grounds. *State v. Allen*, 176 Wn.2d 611, 629-30, 294 P.3d 679 (2013), *as amended* (Feb. 8, 2013).

For example, in *Allen*, the Supreme Court held that the definition of a “true threat” is not an essential element that must appear in the Information.<sup>18</sup> *Id.*; *see also State v. Tellez*, 141 Wn. App. 479, 482-83, 170 P.3d 75 (2007). This is because the true threat requirement merely limits and further defines the statutory element of “threat” so that the statute comports with the first amendment. *Allen*, 176 Wn.2d at 630; *Tellez*, 141

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<sup>17</sup>Compounding this error, the Information cites a nonexistent statute for this count. CP 4.

<sup>18</sup>The court had previously imposed a limiting construction on the bomb threat statute (RCW 9.61.160) to prevent an overbreadth problem. The court read such a requirement into the statute to save it from constitutional infirmity. *State v. Johnston*, 156 Wn.2d 355, 363-366, 127 P.3d 707, 711 (2006).

Wn. App. at 484. Without such a limiting construction, the statute would be overbroad. *Allen*, 176 Wn.2d at 628 (citing *Johnston*.)

Unlike the “true threat” discussed in *Allen*, the “sexual misconduct” requirement is an element of CMIP. The statutory provision prohibiting CMIP is *not* overbroad. *Schimmelpfennig*, 92 Wn.2d at 103.<sup>19</sup> The requirement that the state prove sexual misconduct is itself an essential element of the crime, derived from the statutory language and context. *Id.*, at 102-03. It is not merely a further definition of “immoral purposes” required to save the statute from overbreadth or other constitutional infirmity. *Id.*; *cf. Johnston*, 156 Wn.2d at 363-66.

This difference is reflected in the pattern “to convict” instructions for the two offenses. The pattern “to convict” instruction for CMIP requires proof that the defendant communicated with another person “for immoral purposes of a sexual nature.” WPIC 47.06. By contrast, the “to convict” instructions for bomb threats, harassment, and other charges involving “true threats” do not include the “true threat” requirement. *See* WPIC 36.03 (malicious harassment), WPIC 36.07 and WPIC 36.07.02 (harassment), WPIC 86.02 (bomb threats). In such cases, the “true threat”

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<sup>19</sup> Because the provision’s language and context make clear that the communication at issue must involve sexual misconduct, and because the state’s compelling interest in protecting children allows it to regulate potentially harmful sexual expression directed at minors, the

(Continued)

definition is given as part of the instruction defining threat, not in the “to convict” instruction. *See* WPIC 2.24.

The Information omitted an essential element of CMIP: that the purpose of the communication involved sexual misconduct. CP 4. The remedy is to vacate the conviction and dismiss the charge without prejudice. *Zillyette*, 178 Wn.2d at 164.

C. Entry of convictions for both CMIP and SEM violated the prohibition against double jeopardy.

The court entered convictions for both CMIP and SEM. This violated the prohibition against double jeopardy because the jury could have relied on the same underlying acts in rendering both verdicts.

Appellate courts review double jeopardy claims de novo. *Kelley*, 168 Wn.2d at 76. A defendant may raise a double jeopardy claim for the first time on appeal. *State v. Mutch*, 171 Wn.2d 646, 661, 254 P.3d 803 (2011). Our Supreme Court has made clear that entering convictions for both CMIP and SEM could violate the prohibition against double jeopardy where the jury may have relied on the same underlying acts for both charges. *State v. Jackman*, 156 Wn.2d 736, 746-51, 132 P.3d 136 (2006).

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CMIP statute does not reach a significant amount of constitutionally protected speech. *Schimmelpfennig*, 92 Wn.2d at 102-03.

Courts reviewing such claims look to the entire record, but apply a very strict standard that favors the defense. *Mutch*, 171 Wn.2d at 664. That is, a double jeopardy violation occurs “if it is not clear that it was ‘manifestly apparent to the jury that the state [was] not seeking to impose multiple punishments for the same offense’ and that each count was based on a separate act.” *Mutch*, 171 Wn.2d at 664 (quoting *State v. Berg*, 147 Wn. App. 923, 931, 198 P.3d 529 (2008)).

The required level of clarity can be supplied by “sufficiently distinctive ‘to convict’ instructions or an instruction that each count must be based on a separate and distinct criminal act.” *Mutch*, 171 Wn.2d at 662. In “rare circumstance[s],” double jeopardy violations can be avoided despite deficient jury instructions. *Id.*, at 665. For example, in *Mutch*, the Information charged five counts, the victim testified to five separate rapes, the court gave five separate “to convict” instructions, the defense hinged on consent (rather than the number of offenses), the prosecutor argued for one conviction on each count. *Id.* Under these circumstances, the Supreme Court found it “manifestly apparent to the jury that each count represented a separate act.” *Id.*; see also *State v. Wallmuller*, 164 Wn. App. 890, 265 P.3d 940 (2011).<sup>20</sup>

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<sup>20</sup> In *Wallmuller*, no double jeopardy violation occurred because the state clearly informed the jury in closing which acts corresponded to which charges. *Wallmuller*, 164 Wn. App. at (Continued)

Where a verdict is ambiguous as to whether the jury improperly relied on the same act in returning guilty verdicts on different charges, the reviewing court must resolve the ambiguity in the defendant's favor. *State v. Kier*, 164 Wn.2d 798, 811-14, 194 P.3d 212 (2008).

Here, the trial court did not instruct the jury that to find Mr. Flores-Rodriguez guilty of CMIP it had to rely on separate and distinct acts than it relied on to find him guilty of the exploitation charge. CP 6-13. Unlike *Mutch*, this case did not divide neatly into separate incidents corresponding to each charge. Furthermore, the prosecutor neither specified which acts corresponded to each crime, nor explained that jurors must rely on separate and distinct acts for each count. RP (1/14/15) 202-203; *see generally* RP (1/14/15) 192-203, 215-221.

At least some of Mr. Flores-Rodriguez's alleged conduct, such as inviting L.M.C. to send nude photos or appear nude via Skype, could have satisfied the requirements of either the exploitation charge or the CMIP charge. The Information gave the same date range for both charges. CP 3-5. Without a separate-and-distinct-acts instruction or a clear election by the state, the verdict is ambiguous as to whether the jury relied on the same underlying acts for both charges. That is, the jury may have rendered

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898-99. This made it "manifestly apparent to the jury that each count represented a separate act." *Wallmuller*, 164 Wn. App. at 899.

guilty verdicts on both counts based on Mr. Flores-Rodriguez's alleged attempts to get L.M.C. to send nude photos.

This ambiguity must be resolved in Mr. Flores-Rodriguez's favor. *Kier*, 164 Wn.2d at 811-14. Entry of convictions for both counts violated the prohibition against double jeopardy. The remedy is to reverse the CMIP conviction and remand for resentencing. *Mutch*, 171 Wn.2d at 664.

D. The court commented on the evidence, resulting in a directed verdict on the aggravating circumstance.

The state alleged that the rape charge was part of an ongoing pattern of multiple instances of sexual abuse occurring over a prolonged period of time. CP 5. The trial court's instruction that a " 'prolonged period of time' means more than a few weeks" amounted to an improper comment on the evidence. CP 10; *State v. Brush*, --- Wn.2d ---, 353 P.3d 213, 217-18 (2015). The state cannot show the error harmless beyond a reasonable doubt.

The Washington constitution prohibits judges from commenting on the evidence. Wash. Const. art. IV, § 16. Whether a jury instruction amounts to a comment on the evidence presents a question of law reviewed de novo. *State v. Levy*, 156 Wn.2d 709, 721, 132 P.3d 1076 (2006). A defendant may raise a claim that the trial court commented on the evidence for the first time on appeal. *Levy*, 156 Wn.2d at 719-20. The

reviewing court presumes judicial comments to be prejudicial, “and the burden is on the state to show that the defendant was not prejudiced, unless the record affirmatively shows that no prejudice could have resulted.” *Levy*, 156 Wn.2d at 723.

Our Supreme Court has held that the instruction given here is a comment on the evidence. *Brush*, 353 P.3d at 217-18. The comment prejudiced Mr. Flores-Rodriguez.

Most of the evidence suggested that the inappropriate sexual relationship lasted for only a few months. *See* RP (1/13/15) 120-128.<sup>21</sup> Some jurors may have disbelieved L.M.C.’s testimony concerning the 2012 incident (which she did not mention to police). RP (1/13/15) 112-115. The resulting time frame was not so long that the jury would necessarily have found it to be a prolonged period of time. Thus, the record does not affirmatively show that no prejudice resulted, and the state cannot meet its burden. *Levy*, 156 Wn.2d at 723.

The court’s erroneous instruction effectively compelled the jury to find the aggravating circumstance. Jurors had no choice but to conclude that the abuse occurred over a prolonged period. The remedy is to vacate

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<sup>21</sup> The Information alleged that each of the charged offenses occurred on or between July 1, 2014 and August 2, 2014. CP 4-5.

the exceptional sentence and remand for resentencing. *Brush*, 353 P.3d at 219.

### **CONCLUSION**

This court should reverse Mr. Flores-Rodriguez's convictions because prosecutorial misconduct and ineffective assistance of counsel denied him a fair trial. The prejudice flowing from some instances of misconduct and ineffective assistance exacerbated the prejudice resulting from others.<sup>22</sup> Their cumulative effect denied Mr. Flores-Rodriguez a fair trial. *See State v. Greiff*, 141 Wn.2d 910, 929, 10 P.3d 390 (2000). The remedy is to vacate the convictions and remand for a new trial. *Coe*, 101 Wn.2d at 788-89.

In the alternative, other procedural and constitutional errors require reversal of some or all of Mr. Flores-Rodriguez's convictions. Because the trial court failed to comply with CrR 3.3, this court should reverse and dismiss all of Mr. Flores-Rodriguez's convictions with prejudice. This court should also reverse the CMIP conviction because (1) the jury could have found Mr. Flores-Rodriguez guilty of that charge based on the same acts underlying the SEM conviction, resulting in a double jeopardy

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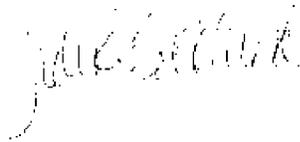
<sup>22</sup>For example, the prosecutor exploited Mr. Flores-Rodriguez's attorney's failure to keep the highly inflammatory herpes evidence from the jury by using that evidence improperly in closing argument to appeal to the passion and prejudice of the jury.

violation; and (2) the information failed to allege an essential element of the crime.

Finally, if the court does not reverse Mr. Flores-Rodriguez's convictions, it must still reverse the exceptional sentence and remand for resentencing. The trial court commented on the evidence, resulting in a directed verdict on the aggravating circumstance.

Respectfully submitted on September 22, 2015,

**BACKLUND AND MISTRY**



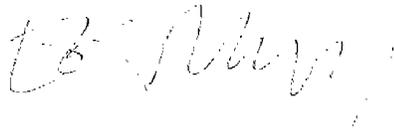
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## CERTIFICATE OF SERVICE

I certify that on today's date:

I mailed a copy of Appellant's Opening Brief, postage prepaid, to:

Jose Flores-Rodriguez, DOC #380045  
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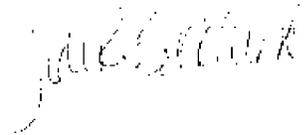
I delivered an electronic version of the brief, using the Court's filing portal, to:

Grays Harbor County Prosecuting Attorney  
Ksvoboda@co.grays-harbor.wa.us

I filed the Appellant's Opening Brief electronically with the Court of Appeals, Division II, through the Court's online filing system.

I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed at Olympia, Washington on September 22, 2015.



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Jodi R. Backlund, WSBA No. 22917  
Attorney for the Appellant

## BACKLUND & MISTRY

September 22, 2015 - 12:16 PM

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