

No. 47890-1-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

vs.

Tyler Robb,

Appellant.

Clark County Superior Court Cause No. 14-1-00868-6

The Honorable Judge Gregory Gonzales

Appellant's Opening Brief

Jodi R. Backlund
Manek R. Mistry
Eric R. Mapes
Attorneys for Appellant

BACKLUND & MISTRY
P.O. Box 6490
Olympia, WA 98507
(360) 339-4870
backlundmistry@gmail.com

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ISSUES AND ASSIGNMENTS OF ERROR

1. The trial court erred by admitting novel scientific evidence over defense objection and in the absence of an adequate foundation.
2. The trial court erred in admitting Y-STR DNA evidence based on a statistical method not generally accepted in the scientific community.
3. The trial court erred in admitting Y-STR DNA evidence despite the absence of any generally accepted method capable of producing reliable results.
4. The trial court erred in finding that Y-STR DNA profile comparison based on the “count method” and using only four STR loci is generally accepted in the relevant scientific community.
5. The trial court erred in finding that Y-STR DNA profile comparison based on the “count method” and using only four STR loci is capable of producing reliable results.

ISSUE 1: A trial court may not admit expert testimony based on a novel scientific theory or principle unless generally accepted in the relevant scientific community and capable of producing reliable results. Must Mr. Robb’s convictions be reversed because they were based in part on a novel scientific theory that is neither generally accepted nor capable of producing reliable results?

6. The trial court erred in admitting Y-STR DNA profile evidence that was not helpful to the jury.

ISSUE 2: Expert testimony involving scientific or technical knowledge is admissible only if helpful to the trier of fact. Must the convictions here be reversed where the trial court admitted Y-STR DNA evidence that amounted to pure speculation?

7. The trial court erred in admitting D.I.A.’s hearsay statements to a neighbor and to her mother.

8. The trial court erred in finding that D.I.A. was still under the stress of a startling event or condition when she made statements to her mother and a neighbor.

ISSUE 3: A statement does not qualify as an excited utterance if undisputed evidence shows that the declarant reflected on the situation and engaged in deception prior to speaking. Did the trial court commit reversible error by admitting prejudicial hearsay testimony, where undisputed testimony showed that D.I.A. reflected on the situation and engaged in deception before making the challenged statements?

9. The trial court erred by admitting D.I.A.'s hearsay statements to Myers under the medical exception.
10. The trial court erred in finding that D.I.A. made statements to Myers for purposes of medical diagnosis or treatment.
11. The trial court erred in finding that Myers relied on D.I.A.'s statements for diagnosis or treatment.

ISSUE 4: A statement is not admissible under the medical exception to the rule against hearsay unless the declarant made the statement for purposes of medical diagnosis or treatment and the provider did not reasonably rely on it for diagnosis or treatment. Should the trial court have excluded D.I.A.'s statements to Myers, where (a) D.I.A. did not make the statements for purposes of diagnosis or treatment, (b) Myers did not rely on them for diagnosis or treatment, and (c) the purpose of the exam was to collect evidence for prosecution?.

12. The prosecutor committed flagrant, ill-intentioned, prejudicial misconduct by "testifying" to "facts" not in evidence during closing argument.
13. The prosecutor committed flagrant, ill-intentioned, prejudicial misconduct by misrepresenting the role of jury and undermining the presumption of innocence.

ISSUE 5: A prosecutor commits misconduct by “testifying” to “facts” not in evidence. Must the convictions here be reversed because of the prosecutor’s improper “testimony” bolstering D.I.A.’s credibility?

ISSUE 6: A prosecutor commits misconduct by misrepresenting the role of the jury. Did the prosecutor commit reversible misconduct by arguing that Mr. Robb was guilty if the jury had an abiding belief that D.I.A.’s testimony was accurate?

14. Conviction of both child molestation and rape of a child based on a single act violates the prohibition against double jeopardy

ISSUE 7: Where the state alleges multiple acts to support two convictions, the court must make it manifestly apparent to jurors that they had to rely on a separate and distinct act to convict on each count. Must one of Mr. Robb’s two convictions be reversed where (a) the state relied on multiple acts of abuse during the same charging period, (b) the court did not give a “separate and distinct acts” instruction, and (3) the prosecutor did not clearly elect which act pertained to which charge?

15. The sentencing court erred in imposing prohibitions not authorized by statute.
16. The sentencing court violated Mr. Robb’s First and Fourteenth Amendment rights by imposing conditions that infringe his fundamental rights to parent his child and to read or view what he wishes.

ISSUE 8: A sentencing court may only impose conditions authorized by statute. Must the sentencing conditions prohibiting use or possession of alcohol, cannabis, controlled substances, and sexually explicit materials be stricken where the record contains no evidence that the offenses involved any such conduct?

ISSUE 9: A sentencing court may only impose conditions that infringe on fundamental liberties if the conditions are reasonably necessary to accomplish essential state needs. Must the condition prohibiting Mr. Robb from having contact with his biological son be stricken where no evidence suggests that he poses any danger to his son?

ISSUE 10: A sentencing court may only impose conditions that infringe on fundamental liberties if they are reasonably necessary to accomplish essential state needs. Must the sentencing conditions prohibiting use or possession of sexually explicit materials be stricken where the record contains no evidence that such materials played any role in the charged crimes?

STATEMENT OF FACTS AND PRIOR PROCEEDINGS

1. While Tyler and Shannon Robb were involved in divorce proceedings, Shannon's daughter D.I.A. accused Mr. Robb of sexual abuse.

Tyler Robb and Shannon Robb married in 2006 and subsequently had a son together. RP 93-94, 177-178. In April of 2014, they lived together with their son and two of Shannon's¹ children from a previous relationship. RP 178. The oldest, Shannon's daughter D.I.A., was 13. RP 94-95, 179. Shannon and Mr. Robb had been discussing divorce since January of 2014. Mr. Robb filed for dissolution that March. RP 190, 418. D.I.A. knew about the ongoing divorce. RP 104-105, 111-112.

On April 28, 2014, D.I.A. accused Mr. Robb of sexual misconduct. RP 95, 179, 185-186. Police arrested Mr. Robb, and brought him to the police station. RP 314-315. Detective Elizabeth Luvera and another detective interrogated him using a "ruse," falsely telling him they had medical evidence of penetration, swelling, bruising, and tearing. RP 324-327, 343.

During the interrogation, Mr. Robb at first denied that any sexual contact occurred, but eventually stated, "I would just like to admit because I don't want to put my daughter through anything then. My wife can win

the fucking divorce thing.” RP 325, 330. He later made another denial, however, during which he implied Shannon put D.I.A. up to the accusation. RP 335. In response to leading questions, he went on to say that he touched D.I.A.’s vagina under her clothes. RP 336. He continued to deny, however, that any penetration or other touching occurred. RP 336-337.

2. At trial, Mr. Robb denied having any sexual contact with D.I.A.

The state charged Mr. Robb with child molestation and rape of a child, both in the second degree. CP 11.

Mr. Robb pled not guilty and went to trial. RP 28. He testified on his own behalf, denying that he touched D.I.A.’s breasts or vagina. RP 424-425. He asserted that he made the admissions to Luvera because he was emotional and just wanted the interrogation to end. RP 433.

3. Over Mr. Robb’s objection, the jury heard D.I.A.’s hearsay statements to her mother and her neighbor.

D.I.A. testified that she stayed home sick on the day of the alleged offense. RP 95-97. According to D.I.A., Mr. Robb came in the room where she was watching TV, lay next to her, and put his hand on her stomach. RP 97-98. She claimed that he then put his hand in her

¹ For clarity, this brief refers to Shannon Robb by her first name.

underwear. RP 98-99. Specifically, D.I.A. stated that she “could then feel him, his finger reach up [her] vaginal area and [she] was being fingered.” RP 99.

At one point, D.I.A. testified that he stopped when she told him to. He then got up and got ready for work. RP 99. She later testified, however, that after he removed his hand from her underwear, he then touched her breast. RP 99-100.

According to D.I.A.’s testimony, after these events but before Mr. Robb left for work, she asked him to get her a bowl of cereal. RP 101, 106-107. D.I.A. stated that she “was a little scared, but [she] tried to act as normal as possible.” RP 106-107. After he got her the cereal, he left the house. RP 101, 107.

D.I.A. then sent a text message to Shannon stating “I don’t feel safe with Dad :([sic]” RP 102; Ex. 4. Shannon responded from her office by text 10 minutes later and instructed D.I.A. to call her. RP 181; Ex. 4. The two spoke on the phone a few minutes later. RP 101, 181. Shannon testified that D.I.A. was crying and difficult to understand, but “said that her father [Mr. Robb] had assaulted her.” RP 181-183.

Shannon told D.I.A. to take her brothers to the neighbor’s house, then left her office to meet them. RP 101, 183-184.

Angela Gariano, the neighbor, testified to statements D.I.A. made. Specifically, Gariano said that D.I.A. told her Mr. Robb had touched her, pointing to her breast and vagina. RP 159-160. The court overruled Mr. Robb's hearsay objection. RP 159.

Shannon arrived at the neighbor's house 30-45 minutes after speaking to D.I.A. by phone. RP 160, 180, 186. Over objection, she also relayed to the jury what D.I.A. told her the day of the alleged abuse. RP 185-186.

Shannon brought D.I.A. to the police station, where she was interviewed by Detective Luvera. RP 312-13. After the interviews, Luvera instructed Shannon to take D.I.A. to the Legacy Salmon Creek Hospital. RP 187-188, 324.

4. Over Mr. Robb's objection, the jury heard D.I.A.'s hearsay statements to the doctor who conducted a forensic examination.

Dr. Kathleen Myers examined D.I.A. at the hospital. RP 288. D.I.A. refused a pelvic exam. RP 293. Myers and a nurse testified that they followed an "evidence collection" protocol using a sexual assault evidence collection kit. RP 292-294, 302-304, 308, 374-375, 393-397.

Over Mr. Robb's objection, Myers was allowed to relay D.I.A.'s hearsay statements. RP 291. Myers testified that D.I.A. said Mr. Robb

had kissed her, fondled her breasts, and “put his fingers inside [her].” RP 291, 298.

In ruling the evidence admissible, the court did not consider D.I.A.’s motivation in making the statements or whether Myers relied on them for diagnosis or treatment. RP 277-278.

The only abnormality Myers noticed during the exam was some redness on the “posterior fourchette” of the “external genitalia.” RP 295-297; Ex. 7. Myers did not testify that she made any diagnosis or offered any treatment.

5. Over Mr. Robb’s objection, the jury heard testimony that DNA consistent with Mr. Robb’s genetic profile was found on D.I.A.’s breast.

During the sexual assault examination of D.I.A., Myers and a nurse took swabs from her vaginal labia, anus, mouth, and left breast to collect DNA evidence. RP 225-227, 303-304, 374-377, 392-393. Brad Dixon from the Washington State Patrol Crime Lab tested the swabs. RP 226.

Mr. Robb objected to Dixon’s testimony. RP 149. The court held a *Frye*² hearing and allowed Dixon to provide expert testimony. RP 202-215.

² *Frye v. United States*, 293 F. 1013 (D.C.Cir.1923).

Dixon testified that only one of the swabs, taken from the left breast, contained male DNA. RP 226, 234. Dixon opined that the DNA likely came from skin cells, not semen or saliva. He noted that it could have arrived there by touching or by secondary transfer. RP 232-235.

Dixon said the amount of male DNA present was “very small,” and he was able to obtain from it only 4 of the 17 pieces of information that usually make up a male “Y-STR” profile. RP 210, 223, 229. Dixon told the jury that this partial profile “was consistent with the Y-STR profile” of Mr. Robb, meaning that “neither [Mr.] Robb nor any of his paternal male relatives can be excluded as the donor of that human male DNA.” RP 228. Dixon described this result as “an inclusion.” RP 230.

Dixon went on to opine that 1 in 9 U.S. males would have this profile. RP 228. He relied on the “count method” to reach this conclusion, meaning he simply divided the number of times the partial profile appeared in a national reference database by the number of profiles in the database. RP 232. Dixon did not identify the database used or explain whose profiles appear in it.

6. The prosecutor referred in closing argument to “facts” that had not been introduced at trial, relied on all the instances of alleged touching in support of the child molestation charge, and argued that Mr. Robb was guilty if the jury had an abiding belief that D.I.A.’s testimony was accurate.

The state's closing argument relied on an asserted consistency among disparate pieces of evidence and D.I.A.'s various statements about the incident. *See, e.g.*, RP 477, 479, 481, 485, 506, 509-512, 516-518. The prosecutor asserted, for example, that "you have another consistent disclosure to her mother when [Shannon] comes in" to Gariano's living room. RP 479.

The prosecutor also told the jury that D.I.A. described the events to Luvera consistently with her statements to others. RP 511. But Luvera did not relay D.I.A.'s statements to the jury. The court sustained Mr. Robb's objection to this argument, but gave a confusing curative instruction. RP 511-512. Specifically, the court stated that "I'll go ahead and strike any references to what a person may or might have said as opposed to what the evidence is," then admonished the jury to "disregard anything that was evidence presented during the trial [sic]." RP 512.

Discussing weaknesses in the DNA evidence in rebuttal, the prosecutor informed the jury that it is not unusual to have a small DNA sample. RP 510. She further asserted that the breast is the most likely place to find DNA hours after a touching occurred. RP 510. No evidence supported these statements.

In discussing the child molestation charge, the prosecutor referred to all of the alleged instances of touching. RP 485-486. Specifically, she

argued that “[w]e’re talking about touching on her stomach, leading to touching on her vagina, leading to touching on her breasts; that’s sexual contact. These are intimate parts of your body.” RP 485-486.

After discussing the reasonable doubt standard, the prosecutor argued as follows:

Do you have an abiding belief that the testimony you heard from [D.I.A.] was accurate as to what happened? Do you have an abiding belief that the testimony about the observations made by the neighbor, Angela, by [D.I.A.]’s mother, Shannon, by [D.I.A.]’s treating emergency department physician, Dr. Myers, and the nurse...and the WSP lab scientist who did the tests on the DNA; do you have an abiding belief that that evidence proves what happened in this case? If so, this defendant is guilty beyond a reasonable doubt as to [both counts].
RP 488.

7. The court imposed sentencing conditions prohibiting Mr. Robb from using or possessing alcohol, cannabis, or sexually explicit materials, and from having contact with minors, including his biological son.

The jury returned guilty verdicts on both counts. CP 54-55; RP 523-525. The court sentenced Mr. Robb to 90 months’ confinement and community custody for life. CP 65-67.

The court also imposed various conditions in the judgment and sentence. CP 79-82. These included prohibitions on contact with any minors, possession or consumption of alcohol, marijuana, or controlled substances, and possession or use of sexually explicit materials. CP 79-82.

The court discussed allowing Mr. Robb to write letters to his biological son through a third party, but this exception to the prohibition on contact with minors does not appear in the judgment and sentence. RP 560-562; CP 79, 63-82.

This timely appeal follows. CP 83.

ARGUMENT

I. THE TRIAL COURT ERRED BY ADMITTING DNA EVIDENCE.

The trial court admitted expert testimony that male DNA obtained from D.I.A.'s breast "was consistent with" Mr. Robb's profile, and that one in nine U.S. males shared this profile. RP 227-228. The testimony was based on a novel theory not generally accepted in the scientific community. Furthermore, the evidence had so little bearing on the issues in the case that it offered no meaningful help to the jury. The court therefore erred in admitting it under the *Frye* test and ER 702. Given the perceived reliability of DNA evidence, the error prejudiced Mr. Robb.

A. Standard of review and governing law.

A qualified expert may testify regarding "scientific, technical, or other specialized knowledge" if it "will assist the trier of fact to understand the evidence or to determine a fact in issue." ER 702.

Admission of such testimony is generally reviewed for abuse of discretion. *State v. Gentry*, 125 Wn.2d 570, 588, 888 P.2d 1105 (1995).

Where the testimony rests on a novel scientific theory or principle, however, our courts determine admissibility under the test articulated in *Frye*, 293 F. at 1014. To pass the *Frye* test, the theory or principle underlying the testimony must have gained general acceptance in the relevant scientific community. Furthermore, there must be generally accepted methods of applying the theory or principle in a manner that can produce reliable results. *In re Det. of Pettis*, 188 Wn. App. 198, 206, 352 P.3d 841 (2015) *review denied*, 361 P.3d 748 (2015).

Appellate courts review admissibility under *Frye* de novo. *State v. Copeland*, 130 Wn.2d 244, 255, 922 P.2d 1304 (1996). This “searching” review “may extend beyond the record and involve consideration of scientific literature as well as secondary legal authority.” *Copeland*, 130 Wn.2d at 255-56. The court may also consider materials not available to the trial court at the time of the initial *Frye* hearing. *Id.* at 256.

- B. DNA profiling based on only four locations on the Y chromosome is not generally accepted in the scientific community, and there is no generally accepted, reliable method of applying any underlying principle.

The theory underlying the DNA testing at issue in this case differs in crucial respects from that underlying the DNA evidence long held

admissible by our courts. It is novel and not generally accepted among genetic scientists. No published Washington opinion has specifically addressed the admissibility of Y-STR profile evidence under *Frye*.³

1. The difference between standard DNA evidence and Y-STR DNA evidence.

Our courts have upheld admission of polymerase chain reaction (PCR) DNA profile evidence in a number of cases. *Gentry*, 125 Wn.2d at 570, 586-88; *State v. Russell*, 125 Wn.2d 24, 54-55, 882 P.2d 747 (1994). Ordinary DNA testing relies on short tandem repeats (STR) which effectively occur independently of one another: they are located far apart on various chromosomes and re-assort randomly during reproduction. LAWRENCE KOBILINSKY, ED., FORENSIC CHEMISTRY HANDBOOK 300 (2012). This allows a high degree of discrimination because the probability of a particular STR observed at any given locus may be multiplied by the probability of those at other loci according to the product rule. *Id.*; *Copeland*, 130 Wn.2d at 264-70.

Y-STR profiling, however, relies entirely on STRs occurring at loci found on a single, relatively short chromosome that is passed intact from father to son. Rebekah Hull & Meaghan Roche, *Why the Y?*, 4

³ Several years ago, however, Division One of this court declined to address a trial court's refusal to hold a *Frye* hearing on Y-STR testing methods, holding that the appellant failed to

FORENSIC MAGAZINE 2, at 10-14 (April/May 2007);⁴ JOHN M. BUTLER, FORENSIC DNA TYPING: BIOLOGY, TECHNOLOGY, AND GENETICS OF STR MARKERS 201 (2005). Because the STRs do not occur independently at divergent loci, the product rule does not apply, drastically reducing the test's discriminatory power. KOBILINSKY, FORENSIC CHEMISTRY HANDBOOK 300; BUTLER, FORENSIC DNA TYPING at 213-14.

2. Shortcomings of the “count” method and the lack of general acceptance.

Scientists performing Y-STR DNA profile analysis instead rely on the “count method,” as Dixon did in Mr. Robb’s case. RP 232. That is, the analyst simply divides the number of times the profile appears in a reference database by the number of profiles in the database. RP 232; DAVID H. KAYE & GEORGE SENSABAUGH, REFERENCE GUIDE ON DNA IDENTIFICATION EVIDENCE 181-182 in FEDERAL JUDICIAL CENTER, NATIONAL RESEARCH COUNCIL OF THE NATIONAL ACADEMIES, REFERENCE MANUAL ON SCIENTIFIC EVIDENCE (3d ed, 2011). This method only provides meaningful results to the extent that the reference database is representative of the population from which the contributor descends. See KAYE & SENSABAUGH, REFERENCE GUIDE at 182.

support the challenge with sufficient argument and authority. *State v. Bander*, 150 Wn. App. 690, 718, 208 P.3d 1242 (2009).

⁴ Available at <http://www.forensicmag.com/articles/2007/04/why-y> (accessed Jan. 6, 2016)

Dixon testified that he used a database containing 28,118 reference samples uploaded from labs all over the U.S. RP 228, 232. Dixon agreed that the samples “are meant to be representative of the larger population.” RP 229. Indeed, to draw meaningful conclusions using the count method, the database sample would have to be representative of the relevant population. Given that law enforcement DNA databases generally obtain their samples from criminal investigations rather than randomized selection,⁵ however, there is little reason to suppose that they actually represent the population at large.

In fact, no meaningful consensus exists in the scientific community as to this key assumption. On the contrary, the literature contains “considerable evidence for geographical substructure at the Y chromosome.” JOHN BUCKLETON, CHRISTOPHER M. TRIGGS, & SIMON J. WALSH, FORENSIC DNA EVIDENCE INTERPRETATION 324 (2005). Numerous studies have shown statistically significant variation in the frequency of Y-STR profiles based on geographic location, even when

⁵ See, e.g., Aaron P. Stevens, Note: Arresting Crime: Expanding the Scope of DNA Databases in America, 79 Tex. L. Rev. 921 (2001); US Y-STR Database, Database Descriptive Statistics, available at <https://www.usystrdatabase.org/pdf/DatabaseDescriptiveStatistics.pdf> (accessed Jan. 7, 2016); Frequently Asked Questions on the CODIS Program and the National DNA Index System, www.fbi.gov/about-us/lab/biometric-analysis/codis/codis-and-ndis-fact-sheet (accessed Jan. 7, 2016).

limited to identifiable racial groups.⁶ Forensic scientists therefore warn that “it is imperative that every effort should be made to use appropriate local databases” to estimate the frequency of a particular Y-STR profile. BUCKLETON, TRIGGS, & WALSH, FORENSIC DNA EVIDENCE at 324. This was not done in Mr. Robb’s case.

Essentially, a Y-STR profile “match” limits the number of possible contributors to “all patrilineal related male relatives and an unknown number of unrelated males.” BUTLER, FORENSIC DNA TYPING at 214. Such problems are further exacerbated here, where the small sample obtained yielded a profile consisting of only 4 of the 17 loci that a Y-STR profile normally comprises. RP 210. One of the limitations of PCR DNA profiling is that

when the trace evidence sample is small and extremely degraded, STR profiling can be afflicted with allelic “drop-in” and “drop-out,” requiring judgments as to whether true peaks are missing and whether spurious peaks are present. Experts then might disagree about whether a suspect is included or excluded—or whether any conclusion can be drawn.

⁶ See, e. g., Carolina Bonilla et al., *Admixture in the Hispanics of the San Luis Valley, Colorado, and its Implications for Complex Trait Genemapping*, 68 ANNALS OF HURN. GENETICS 139 (2004); M. Hedman et al., *Analysis of 16 Y STR Loci in the Finnish Population Reveals a Local Reduction in the Diversity of Male Lineages*, 142 FORENSIC SCI. INTL. 37 (2004); L. Roewer et al., *Online Reference Database of European Y-Chromosomal Short Tandem Repeat (STR) Haplotypes*, 118 FORENSIC SCI. COMM. 106 (2001); Michael E. Weale et al., *Armenian Y Chromosome Haplotypes Reveal Strong Regional Structure Within a Single Ethno-National Group*, 109 HUM. GENETICS 659 (2001); M.T. Zarrabaitia et al., *Significance of Micro-Geographical Population Structure in Forensic Cases*, 117 INT’L J. LEGAL MED. 302 (2003); Tatiana Zerjal et al., *The Genetic Legacy of the Mongols*, 72 AM. J. HUM. GENETICS 717 (2003).

KAYE & E SENSABAUGH, REFERENCE GUIDE at 160. That is, when the initial sample is very small, the reliability of the testing procedure is greatly diminished. See ERIN MURPHY, INSIDE THE CELL: THE DARK SIDE OF FORENSIC DNA 74-84 (2015). As the number of loci in a profile decreases, furthermore, so does the statistical significance of a database match. MURPHY, INSIDE THE CELL at 106-119.

Nothing close to general acceptance exists as to whether any meaningful statistical conclusions follow from a 4-loci Y-STR profile's frequency in a national law enforcement database. There is no general scientific consensus that the type of national database used in this case is actually representative of the population at issue. Without a representative database, there is no generally accepted way to apply the count method that can produce reliable results.

The DNA testimony in this case thus fails both prongs of the *Frye* test. *Pettis*, 188 Wn. App. at 206. The court erred in admitting it.

C. The DNA evidence was not helpful to the jury, and should have been excluded under ER 702.

The DNA evidence here had little or no probative value under the facts of this case. The court abused its discretion in admitting it.

After conducting the *Frye* analysis, the trial court must then evaluate the scientific evidence under the ER 702 standard. *Copeland*, 130

Wn.2d at 256. As noted, courts may admit expert scientific testimony under ER 702 only if it will be helpful to the trier of fact. Although trial courts enjoy wide latitude to admit expert testimony, a court abuses its discretion by admitting such testimony if it rests on an inadequate foundation or amounts to “pure speculation.” *State v. Pittman*, 88 Wn. App. 188, 198, 943 P.2d 713 (1997); *Safeco Ins. Co. v. McGrath*, 63 Wn. App. 170, 179, 817 P.2d 861 (1991).

Undisputed evidence established that the DNA sample obtained from D.I.A.’s breast was “very small.” RP 210. Dixon testified that it could have arrived there by secondary or some further degree of transfer, and that the DNA likely came from skin cells, not semen or saliva. RP 232-235. That is, D.I.A.’s breast could simply have touched something that had been in contact with another object the contributor had previously touched.

Undisputed evidence also established that, at the time of the alleged incident, D.I.A. lived in the same house as Mr. Robb, as well as his biological son—who would necessarily have shared the exact same Y-STR profile. RP 178, 404-405. In fact, D.I.A. testified that she was actually in Mr. Robb’s bedroom, lying in his bed the morning of the events at issue. RP 97.

Given the unreliability of the analytical method Dixon employed, any connection between the tiny amount of male skin cell DNA and D.I.A.'s allegation amounts to pure speculation. The testimony rests on an inadequate foundation and is too speculative to have properly been of assistance to the jury. The court abused its discretion in admitting it.

D. The improper DNA testimony prejudiced Mr. Robb.

Faced with a credibility contest between Mr. Robb and D.I.A., the jury likely relied on the seemingly reliable and scientific expert testimony to resolve the conflicting accounts in D.I.A.'s favor. The improper admission of the DNA evidence therefore prejudiced Mr. Robb.

A non-constitutional evidentiary error merits reversal if it prejudiced the defendant. *State v. Neal*, 144 Wn.2d 600, 611, 30 P.3d 1255 (2001). An evidentiary error is sufficiently prejudicial to merit reversal if “within reasonable probabilities, had the error not occurred, the outcome of the trial would have been materially affected.” *Neal*, 144 Wn.2d at 611 (quoting *State v. Smith*, 106 Wn.2d 772, 780, 725 P.2d 951 (1986)).

Given the “aura of reliability surrounding DNA evidence,” the improper admission of the expert testimony likely affected the verdict. *United States v. Bonds*, 12 F.3d 540, 567 (6th Cir. 1993). The trial hinged on whether the jury would credit Mr. Robb’s denial over D.I.A.’s

testimony. Dixon provided a superficially scientific, objective way to resolve the conflict.

The DNA testimony failed the *Frye* test and was not helpful to the jury. It likely affected the verdict. Its admission was improper and prejudicial. This court should reverse Mr. Robb's convictions.

II. THE COURT ERRED BY ALLOWING THE INTRODUCTION OF INADMISSIBLE HEARSAY THAT PREJUDICED MR. ROBB.

The jury repeatedly heard inadmissible hearsay testimony tending to corroborate D.I.A.'s account. The court erroneously admitted the testimony over Mr. Robb's objections, relying on inapplicable exceptions to the rule against hearsay. The improper testimony prejudiced Mr. Robb.

A. The court erred in admitting D.I.A.'s hearsay statements as excited utterances.

The court admitted testimony from both Angela Gariano and Shannon Robb describing statements D.I.A. allegedly made after the alleged touching occurred. The court improperly overruled Mr. Robb's hearsay objections to this testimony, since undisputed evidence affirmatively shows that D.I.A. engaged in conscious fabrication before making the statements.

1. Standard of review and governing law.

Hearsay is generally inadmissible to prove the truth of the matters asserted. ER 801, 802. An out-of-court statement is admissible as an “excited utterance,” however, if it “relat[es] to a startling event or condition” and is “made while the declarant was under the stress of excitement caused by the event or condition.” ER 803(a)(2).

The rationale for this exception rests “on the idea that under certain external circumstances of physical shock, a stress of nervous excitement may be produced which stills the reflective faculties and removes their control.” *State v. Chapin*, 118 Wn.2d 681, 686, 826 P.2d 194 (1992) (internal quotation marks omitted). Thus, a court may admit a statement under this exception only if “the statement was made while the declarant was still under the influence of the event to the extent that [it] could not be the result of fabrication, intervening actions, or the exercise of choice or judgment.” *State v. Brown*, 127 Wn.2d 749, 758, 903 P.2d 459 (1995) (internal quotation marks omitted).

Admission of hearsay as an excited utterance is reviewed for abuse of discretion. *Chapin*, 118 Wn.2d at 688-89. A court necessarily abuses its discretion in admitting such hearsay, however, where the record affirmatively establishes that the declarant had the opportunity to reflect before making the statement. *State v. Hochhalter*, 131 Wn. App. 506, 514-16, 128 P.3d 104 (2006); *Brown*, 127 Wn.2d at 758.

The proponent of excited utterance hearsay testimony must meet three interrelated requirements: “that (1) a startling event or condition occurred, (2) the declarant made the statement while under the stress of excitement of the startling event or condition, and (3) the statement related to the startling event or condition.” *State v. Ohlson*, 162 Wn.2d 1, 8, 168 P.3d 1273 (2007). The “essence of the rule” lies in the second element, the “key” to which “is spontaneity.” *Chapin*, 118 Wn.2d at 687-88. Accordingly, “as the time between the event and the statement lengthens, the opportunity for reflective thought arises and the danger of fabrication increases.” *Chapin*, 118 Wn.2d at 688.

Regardless of the time elapsed, however, a statement may not be admitted as an excited utterance where evidence establishes that the declarant actually took advantage of the opportunity to reflect and lie prior to making the statement. Thus, where the declarant “had the opportunity to, and did in fact, decide to fabricate a portion of” the statement, the trial court necessarily errs in admitting it as an excited utterance. *Brown*, 127 Wn.2d at 759; *State v. Young*, 160 Wn.2d 799, 807, 161 P.3d 967 (2007). Similarly, “if the witness had an opportunity to, and did fabricate a lie after the startling event and before making the statement, the statement is not an excited utterance.” *State v. Williamson*, 100 Wn. App. 248, 258, 996 P.2d 1097 (2000) (citing *Brown*, 127 Wn.2d at 757–58).

Put another way, “[b]ecause the excited utterance rule is based on the premise that the speaker has no opportunity to lie before making the utterance, if the speaker in fact did have that opportunity, then by definition the statement cannot be an excited utterance.” *State v. Briscoeray*, 95 Wn. App. 167, 172, 974 P.2d 912 (1999). In such cases, furthermore, “the credibility of the statement is irrelevant.” *Briscoeray*, 95 Wn. App. at 172. Thus, whenever undisputed evidence shows “that the declarant consciously reflected on what he or she said before he or she said it,” the court errs in admitting it as an excited utterance no matter how reliable it may otherwise appear. *Hochhalter*, 131 Wn. App. at 515-16.

2. D.I.A.’s statements did not qualify as excited utterances because she had the opportunity to reflect before making them.

As described, D.I.A.’s own undisputed testimony established that she consciously reflected and engaged in deception after the alleged touching but before making the challenged statements to Shannon and Gariano. That is, she testified that she “tried to act as normal as possible,” going so far as to ask Mr. Robb to get her a bowl of cereal. RP 101, 106-107. D.I.A. also testified that *before* going to Gariano’s and making the statements, she communicated with Shannon by text, and later by phone, about what to do. RP 101-102.

Thus, D.I.A.'s own uncontroverted testimony establishes that she had the opportunity to consciously reflect on the situation prior to making the challenged statements.⁷ After engaging in such reflection, she consciously decided what to say and how to act. By definition, then, neither the statements she made in Gariano's living room nor those she made after Shannon arrived qualify as excited utterances. *Brown*, 127 Wn.2d at 759; *Young*, 160 Wn.2d at 807; *Hochhalter*, 131 Wn. App. at 515-16; *Briscoeray*, 95 Wn. App. at 172. The trial court therefore erred in admitting them.

B. The court erred in admitting D.I.A.'s statements made during the forensic examination.

Myers, the physician who examined D.I.A. at the hospital, testified to statements D.I.A. made describing the alleged touching. These statements identified her "stepdad," Mr. Robb, as the perpetrator and indicated that he had penetrated her vagina with his fingers. RP 291, 297.

⁷ Furthermore, D.I.A. made the statements to Gariano and Shannon well after any startling event. The evidence established that D.I.A. waited until Mr. Robb left the house before texting Shannon, who did not respond for 10 minutes. RP 101, 193. Sometime later she called Shannon, or Shannon called her (their testimony differs on this point). Only after this phone conversation did D.I.A. go to Gariano's house. RP 101, 181-183. Thus, sufficient time passed for D.I.A. to reflect on the situation before she made the challenged statements to Gariano. See *Chapin*, 118 Wn.2d at 688.

Shannon testified that the drive from her office normally takes at least 45 minutes, and that she did not leave work until at least 20 to 30 minutes after D.I.A. initially texted her about the incident. RP 181, 193-194. Thus, sufficient time passed for D.I.A. to reflect on the situation before she made the challenged statements to Gariano, and more than an hour

The court erred in overruling Mr. Robb’s hearsay objection to this testimony because the undisputed evidence showed that D.I.A. did not make the statements with the understanding that they would further diagnosis or treatment. On the contrary, the purpose of the exam was to collect evidence for prosecution.

1. Standard of review and governing law

The court relied on the medical exception to the rule against hearsay. The rule allows testimony about out-of-court statements concerning the nature or cause of a medical problem if (1) the declarant made the statement “for purposes of medical diagnosis or treatment” and (2) it was “reasonably pertinent to diagnosis or treatment.” ER 803(a)(4).

To properly admit hearsay under this exception, “(1) the declarant’s motive in making the statement must be to promote treatment, and (2) the medical professional must have reasonably relied on the statement for purposes of treatment.” *State v. Doerflinger*, 170 Wn. App. 650, 664, 285 P.3d 217 (2012) (internal quotation marks omitted). Thus, the exception will not usually apply if the “only purpose for going to the hospital was to gather evidence.” *State v. Williams*, 137 Wn. App. 736, 747, 154 P.3d 322 (2007).

passed before she made the challenged statements to Shannon. *See Chapin*, 118 Wn.2d at 688.

Furthermore, where, as here, a child who has not sought medical treatment visits a health care provider at the state's instance, "the State's burden under ER 803 is more onerous." *State v. Carol M.D.*, 89 Wn. App. 77, 86, 948 P.2d 837 (1997) *withdrawn in part on other grounds*, 97 Wn. App. 355, 983 P.2d 1165 (1999). To be properly admitted in such cases, the "record must affirmatively demonstrate the child made the statements understanding that they would further the diagnosis and possible treatment of the child's condition." *Id.* at 86.

2. D.I.A. did not make the statements Myers to further diagnosis or treatment.

The record here establishes that the purpose of the exam was to collect evidence in anticipation of prosecution. The record affirmatively shows that Shannon took D.I.A. to the hospital at the direction of Detective Luvera, the investigating officer. RP 187-188. They did not go to D.I.A.'s usual health care provider. RP 121.

Myers and the nurse both repeatedly testified that they followed a "very strict format" or "protocol" for "evidence collection." RP 292-294, 302-304, 308, 374-375, 393-397. Neither health care professional claimed to have offered any treatment, let alone to any reliance on D.I.A.'s statements for purposes of treatment. Instead, they relied on D.I.A.'s statements to guide them as they took DNA samples.

In addition, no evidence suggests that D.I.A. understood that the statements would further diagnosis or treatment. According to her own testimony, D.I.A. was not aware that she had suffered any physical injury prior to the exam. RP 121. She would not even allow Myers to perform a speculum exam, demonstrating no interest in assisting the doctor with making a diagnosis. RP 293.

The statements were thus inadmissible because (1) D.I.A. underwent the exam at the state's instance, and (2) the record does not affirmatively demonstrate she understood the statements would assist with diagnosis or treatment. *Carol M.D.*, 89 Wn. App. at 86. Indeed, it appears that the "only purpose for going to the hospital was to gather evidence." *Williams*, 137 Wn. App. at 747.

Even if D.I.A. had not gone to the hospital at Luvera's direction, the statements do not fall within the ER 803(a)(4) exception. First, D.I.A. did not make the statements with the intent to promote diagnosis or treatment. Second, the health care provider did not rely on them for treatment purposes. *Doerflinger*, 170 Wn. App. at 664.

The trial court relied on appellate decisions upholding admission of statements in child sex abuse cases.⁸ RP 277-278. That such evidence

⁸ This court has held similar testimony admissible in a number of cases. *E.g.*, *Williams*, 137 Wn. App. at 740; *State v. Ackerman*, 90 Wn. App. 477, 481-83, 953 P.2d 816 (1998); *State v. Sims*, 77 Wn. App. 236, 237, 890 P.2d 521 (1995). However, such cases typically involve

has sometimes been held admissible in other cases does not establish that it is always admissible or that it met the requirements of ER 803(a)(4) in this case. The court failed to address the key issues: whether D.I.A. made the statements understanding that they would promote diagnosis or treatment and whether Myers reasonably relied on them for those purposes.

Uncontroverted evidence from the state's own witnesses established that D.I.A. did not describe the alleged touching or identify Mr. Robb with the understanding that the statements would assist with any diagnosis or treatment. The record further establishes that the purpose of the examination was to collect evidence for prosecution, not diagnosis or treatment of any injury. The statements were thus inadmissible under ER 803(a)(4) as a matter of law, and the court erred in admitting them.

C. The improper hearsay testimony prejudiced Mr. Robb.

Evidentiary error requires reversal if it prejudiced the defendant. *Neal*, 144 Wn.2d at 611. An evidentiary error is sufficiently prejudicial to merit reversal where there is a reasonable probability of a better trial outcome absent the error. *Neal*, 144 Wn.2d at 611.

statements made by declarants who made them for purpose of diagnosis or treatment, and medical professionals relied on the statements for that purpose. Furthermore, none of these cases involved the heightened standard articulated in *Carol M.D.*, 89 Wn. App. at 86.

The trial hinged on whether the jury would credit Mr. Robb's denial over D.I.A.'s testimony. The improper hearsay testimony allowed the jury to hear numerous prior consistent statements, bolstering the credibility of D.I.A.'s allegation. The prosecutor expressly relied on the prior consistent statements in arguing that the state had met its burden. RP 479, 481, 485, 511.

The other evidence in the case was not overwhelming. The state conceded in closing that the physical evidence alone did not prove the state's case beyond a reasonable doubt. RP 481-482, 508-509. Detective Luvera similarly appeared to agree on cross-examination that Mr. Robb's supposed confession was not especially compelling. RP 351-55.

Myers's hearsay testimony in particular seriously prejudiced Mr. Robb. The rape count required the state to prove that penetration occurred. CP 45-46. Only Myers testified that D.I.A. described penetration.

In her trial testimony, D.I.A. never expressly stated that Mr. Robb's fingers penetrated her vagina: she said only that she "could then feel him, his finger reach up [her] vaginal area and [that she] was being fingered." RP 99. Neither Shannon nor Gariano testified that D.I.A. described any penetration when she related the incident to them. RP 159-60, 185. The vaginal swabs taken the day of the incident yielded no male DNA. RP 226, 234.

Myers, however, explicitly stated that D.I.A. told her Mr. Robb had “put his fingers inside [her].” RP 297-298. Thus, the improperly admitted hearsay provided the only direct assertion that penetration had occurred.

It is reasonably probable that, absent the improperly admitted hearsay testimony, Mr. Robb would have obtained a better trial outcome. This court should reverse the convictions. *Neal*, 144 Wn.2d at 611.

III. PROSECUTORIAL MISCONDUCT DENIED MR. ROBB A FAIR TRIAL.

The prosecutor alleged facts not in evidence and mischaracterized the role of the jury in closing argument. Although the court sustained Mr. Robb’s objection to some of the misconduct, it gave a confusing and inadequate curative instruction. The improper arguments likely affected the verdict.

A. 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.

B. 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 informed the jury that it is not unusual to have a small DNA sample and that the breast is the most likely place to find DNA hours after touching occurred. RP 510. No evidence in the record supports these assertions.

The state's attorney also told the jury that D.I.A. described her allegations to Luvera consistently with her statements to others. RP 511. Luvera never testified as to exactly what D.I.A. told her. RP 312-314. Mr. Robb timely objected to this argument. RP 511. The court sustained Mr. Robb's objection, but gave a confusing and inadequate curative instruction. RP 512.

The prosecutor committed misconduct by arguing "facts" not in evidence. *Glasmann*, 175 Wn.2d at 704-706. The misconduct prejudiced Mr. Robb, as outlined below.

C. The prosecutor mischaracterized the jury's role, undermining the presumption of innocence.

It is improper for a prosecutor to mischaracterize the burden of proof and the role of the jury. *State v. Emery*, 174 Wn.2d 741, 760, 278 P.3d 653 (2012). Suggestions that the jury's job is to decide the "truth," "solve the case [or] declare what happened" mischaracterize the jury's proper role. *Emery*, 174 Wn.2d at 760; *State v. Anderson*, 153 Wn. App. 417, 429, 220 P.3d 1273 (2009). The jury's role is "to determine whether the State has proved the charged offenses beyond a reasonable doubt." *Emery*, 174 Wn.2d at 760. It is improper for the prosecutor to suggest otherwise. *Id.*

Here, the prosecutor asked the jurors if they had “an abiding belief that [D.I.A.’s testimony] was accurate as to what happened?” RP 488. If so, the state informed them, Mr. Robb was “guilty beyond a reasonable doubt.” RP 488. This effectively informed the jurors that their job was to decide what really happened and who was telling the truth. This misstated the role of the jury and amounted to improper argument. *Emery*, 174 Wn.2d at 760.

D. The misconduct likely affected the verdict.

The prosecutor informed the jury that D.I.A. had also described the events to Luvera consistently with D.I.A.’s trial testimony. The court’s confusing curative instruction did not clearly prohibit the jury from considering this information. Once jurors heard this information, furthermore, even a proper instruction could not realistically cause them to disregard it. This misconduct posed a substantial likelihood of affecting the verdict by bolstering D.I.A.’s credibility.

The state’s unsupported assertions that it was not unusual to find such a small amount of DNA, and that the breast would be the most likely place to find it, amounted to flagrant and ill-intentioned misconduct. The statements served to raise the apparent probative value of the DNA evidence.

The *Glasmann* court noted that jurors may “give special weight to the prosecutor’s arguments, not only because of the prestige associated with the prosecutor’s office but also because of the fact-finding facilities presumably available to the office.” Once implanted in the jurors’ minds, the prosecutor’s explanation for the deficiencies in the DNA evidence could not likely be dislodged by a curative instruction.

The prosecutor’s remarks concerning the jury’s role tended to exacerbate the prejudice flowing from the other misconduct. The cumulative effect of these various instances of misconduct could not have been cured by remedial instruction and denied Mr. Robb a fair trial. The remedy is to reverse the conviction and remand for further proceedings. *Glasmann*, 175 Wn.2d at 714.

IV. THE COURT’S INSTRUCTIONS AND THE PROSECUTOR’S ARGUMENT RESULTED IN CONVICTIONS THAT VIOLATE DOUBLE JEOPARDY.

The court did not instruct the jury that it had to base each conviction on a separate and distinct act. CP 36-53. The prosecutor exacerbated the problem by arguing that Mr. Robb committed molestation by touching D.I.A.’s vagina. *See* RP 485-486. Entry of convictions for both charges therefore violates the double jeopardy prohibition.

Double jeopardy claims are reviewed de novo. *State v. Kelley*, 168 Wn.2d 72, 76, 226 P.3d 773 (2010). 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); RAP 2.5(a)(3).

The reviewing court looks to the entire record, but the standard is very strict. *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)). Where a verdict is ambiguous as to whether the jury improperly relied on the same conduct 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 court did not instruct the jury that it must rely on separate and distinct acts for each charge. CP 36-53. In discussing the child molestation charge, the prosecutor discussed all the alleged instances of touching: “We’re talking about touching on her stomach, leading to touching on her vagina, leading to touching on her breasts.” RP 485-486. By doing so, the prosecutor encouraged jurors to convict Mr. Robb of molestation based on the same act that comprised the rape charge. Thus, the state failed to make it manifestly apparent that each count relied on a

separate and distinct act. *Cf State v. Wallmuller*, 164 Wn. App. 890, 265 P.3d 940 (2011).

The jury could conceivably have convicted Mr. Robb on both counts based solely on the allegation of vaginal touching. Entry of convictions for both counts therefore violated the double jeopardy prohibition. *Mutch*, 171 Wn.2d at 664; *Kier*, 164 Wn.2d at 811-14. The remedy is to reverse one of the convictions and remand for resentencing. *Mutch*, 171 Wn.2d at 664.

V. THE COURT EXCEEDED ITS STATUTORY AUTHORITY AND VIOLATED MR. ROBB’S CONSTITUTIONAL RIGHTS BY IMPOSING SENTENCING CONDITIONS UNRELATED TO THE CIRCUMSTANCES OF THE OFFENSES.

A. The conditions imposed do not qualify as crime-related prohibitions.

Sentencing courts may impose only those punishments authorized by statute. *State v. Button*, 184 Wn. App. 442, 446, 339 P.3d 182 (2014). A defendant may raise a claim that the court imposed a sentence without statutory authority for the first time on appeal. *State v. Bahl*, 164 Wn.2d 739, 744-45, 193 P.3d 678 (2008).

The Sentencing Reform Act authorizes sentencing courts to impose only “crime-related prohibitions.” RCW 9.94A.505(9); *State v. Warren*, 165 Wn.2d 17, 32, 195 P.3d 940 (2008). Such prohibitions must directly

relate to the circumstances of the crime. RCW 9.94A.030(10); *Warren*, 165 Wn.2d at 32.

RCW 9.94A.505(9) allows courts to prohibit the use or possession of alcohol or controlled substances only “if the court finds that any chemical dependency or substance abuse contributed to the offense.” The court made no such finding here. CP 63-82; RP 550-563. Even were such a finding implied, no evidence in the record would support it. Indeed, the state conceded at sentencing that no evidence suggested the use of alcohol, cannabis, or controlled substances played any role in the crimes of conviction. RP 537.

These prohibitions bear no reasonable relationship to the charged offenses. The court did not find that use of alcohol, cannabis, or controlled substances contributed to the offense, and no evidence in the record would support such a finding. The court abused its discretion in imposing the prohibitions. RCW 9.94A.030(13), .505(9); *Warren*, 165 Wn.2d at 32.

B. Two of the improper sentencing conditions infringe Mr. Robb’s constitutional rights.

Sentencing conditions that interfere with a fundamental constitutional right require careful review. *Warren*, 165 Wn.2d at 32. They “must be sensitively imposed” and “reasonably necessary to accomplish the essential needs of the State and public order.” *Id.*

1. The court infringed Mr. Robb's First Amendment rights.

Here, the court prohibited the possession or use of sexually explicit materials. The record contains no evidence that Mr. Robb ever viewed such materials, let alone that they played any role in the charged crimes. Accordingly, the prohibition is not authorized by statute. RCW 9.94A.030(10); *Warren*, 165 Wn.2d at 32.

In addition, the First Amendment protects the right to possess and use sexually explicit materials. *Bahl*, 164 Wn.2d at 757-58. As with other fundamental rights, sentencing conditions restricting this right "must be reasonably necessary to accomplish essential state needs and public order." *Bahl*, 164 Wn.2d at 758. In the absence of any evidence that sexually explicit materials contributed to the charged conduct, the state failed to show that the prohibition serves any essential state need, let alone that it is reasonably necessary to achieve one.

2. The court infringed Mr. Robb's constitutional right to parent his son.

The sentencing court prohibited Mr. Robb from having any contact with minors. CP 79, 82. This included contact with his own biological son.⁹ RP 559-562. This prohibition bears no reasonable relationship to the

⁹ The court apparently contemplated allowing Mr. Robb to write letters to his son, to be delivered through a third party. RP 560-562. The judgment and sentence does not reflect this exception. CP 79, 63-82.

circumstances of the charged offenses. Accordingly, it is not authorized by statute. RCW 9.94A.030(10); *Warren*, 165 Wn.2d at 32.

Furthermore, the right to parent one's children is fundamental, and government restriction of it subject to strict scrutiny. *Santosky v. Kramer*, 455 U.S. 745, 102 S.Ct. 1388, 71 L.Ed.2d 599 (1982). Thus, where a defendant stands convicted of a child sex offense involving an unrelated victim, the state may prohibit contact with the offender's biological children only if it makes "an affirmative showing that the offender is a pedophile or that the offender otherwise poses the danger of sexual molestation of his or her own biological children." *State v. Letourneau*, 100 Wn. App. 424, 442, 997 P.2d 436 (2000).

Here, the alleged victim was a teenage girl, unrelated by blood. The state did not allege that Mr. Robb is a pedophile. The record contains no evidence suggesting that Mr. Robb might be a danger to male children, let alone his own biological son. Indeed, the state effectively conceded as much at sentencing. RP 559. Thus, the record discloses no essential state need that this prohibition is reasonable necessary to achieve.

C. The improper sentencing conditions must be stricken.

The sentencing conditions prohibiting Mr. Robb from contacting his biological son and from using or possessing sexually explicit materials, alcohol, or cannabis bear no reasonable relationship to the charged

offenses. The court abused its discretion by imposing them. The remedy is to remand with instructions to strike the conditions from the judgment and sentence. *State v. O'Cain*, 144 Wn. App. 772, 775, 184 P.3d 1262 (2008).

For an additional, independent reason, the court abused its discretion by imposing the prohibitions concerning contact with Mr. Robb's son and sexually explicit materials. These prohibitions restrict fundamental rights, and the state failed to show them reasonably necessary to achieve any essential government interest. *Letourneau*, 100 Wn. App. at 442. These conditions must also be stricken on this basis.

CONCLUSION

This court should reverse Mr. Robb's convictions because evidentiary errors and prosecutorial misconduct denied him a fair trial. The trial court erroneously admitted highly prejudicial Y-STR DNA evidence based on a theory not generally accepted in the scientific community, for which there is no generally accepted method capable of producing reliable results. This evidence was also inadmissible under ER 702 because it was not helpful to the trier of fact.

The trial court also erroneously admitted hearsay evidence tending to corroborate D.I.A.'s testimony. The requirements of the excited utterance hearsay exception were not met because D.I.A. had the

opportunity to and did engage in reflection before making the statements to Gariano and Shannon. The medical diagnosis or treatment exception did not apply because D.I.A. did not make the statements to Myers with the intent to assist with diagnosis or treatment and Meyers did not rely on them for those purposes.

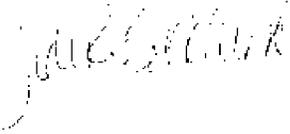
Finally, the prosecutor relied on facts not admitted in evidence and mischaracterized the role of the jury. The misconduct likely affected the verdict and, to the extent Mr. Robb did not object to it, the resulting prejudice could not have been cured by remedial instruction.

This court should also reverse the child molestation conviction because entry of convictions for both that crime and rape of a child amount to double jeopardy. The court did not instruct the jury it had to rely on separate and distinct acts for each count, and the state did not clearly elect which conduct it relied on for each charge.

In the alternative, this court should reverse the sentencing conditions prohibiting Mr. Robb from possessing or using alcohol, cannabis, controlled substances, or sexually explicit materials, as well as prohibition against contact with his biological son. These conditions are not reasonably crime related and infringe on fundamental rights without an adequate state need.

Respectfully submitted on January 13, 2016,

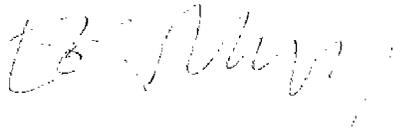
BACKLUND AND MISTRY



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



Manek R. Mistry, WSBA No. 22922
Attorney for the Appellant



Eric R. Mapes, WSBA No. 45509
Attorney for the Appellant

CERTIFICATE OF SERVICE

I certify that on today's date:

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

Tyler Robb, DOC #383965
Coyote Ridge Corrections Center
PO Box 769
Connell, WA 99326

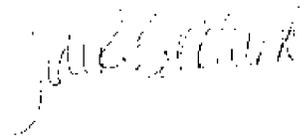
With the permission of the recipient(s), I delivered an electronic version of the brief, using the Court's filing portal, to:

Clark County Prosecuting Attorney
prosecutor@clark.wa.gov

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 January 13, 2016.



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

BACKLUND & MISTRY

January 13, 2016 - 12:56 PM

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