

COA NO. 48119-7-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION TWO

STATE OF WASHINGTON,

Respondent,

v.

JONATHAN DUENAS,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR CLARK COUNTY

The Honorable Scott Collier, Judge

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. Improper opinion testimony violated appellant's right to a fair trial and to have factual questions decided by the jury, in violation of the Sixth Amendment of the United States Constitution and article I, sections 21 and 22 of the Washington Constitution.

2. Appellant's trial attorney provided ineffective assistance of counsel in failing to object to the improper opinion testimony.

3. Appellant's trial attorney provided ineffective assistance of counsel in failing to renew an objection to the admission of child hearsay statements during the course of trial.

4. Prosecutorial misconduct violated appellant's due process right to a fair trial.

5. Appellant's trial attorney provided ineffective assistance of counsel in failing to object to prosecutorial misconduct.

6. Cumulative error deprived appellant of his due process right to a fair trial.

7. The conviction for child molestation under count 2 violates the constitutional prohibition against double jeopardy.

8. The court erred in imposing a sentence for count 4 that exceeds the statutory maximum. CP 61-62.

9. The court erred in imposing the following condition of community custody: "You shall submit to plethysmograph exams, at your own expense, at the direction of the community corrections officer and copies shall be provided to the Prosecuting Attorney's Office upon request." CP 76.

10. The community custody condition requiring appellant to "not enter into a relationship with anyone who has minor aged children residing in or visiting their home without the approval of the therapist and the CCO" is vague in violation of due process. CP 78.

Issues Pertaining to Assignments of Error

1. Whether the mother's testimony that her daughters would not lie about being abused in this case constituted impermissible opinion testimony on the credibility of witnesses and the guilt of appellant, requiring reversal of the convictions?

2. Whether the prosecutor committed misconduct in eliciting the improper opinion testimony?

3. Whether defense counsel was ineffective in failing to object to the improper opinion testimony?

4. Whether counsel was ineffective in failing to renew objection to the admission of child hearsay statements when the trial testimony of a key witness differed in material respects from her

testimony at the pre-trial hearing at which admissibility was initially determined, undermining the reliability of the hearsay statements?

5. Whether the prosecutor committed misconduct in closing argument in a variety of ways, requiring reversal of the convictions due to the incurable nature of the cumulative misconduct?

6. Whether counsel was ineffective in failing to object to the prosecutor's misconduct in closing argument?

7. Whether some combination of errors specified above violated appellant's due process right to a fair trial under the cumulative error doctrine?

8. Whether the conviction for child molestation under count 2 violates double jeopardy because it is based on the same act as the rape conviction under count 1?

9. Whether the combination of confinement and community custody for the child molestation conviction under count 4 exceeds the five-year statutory maximum?

10. Whether the community custody condition requiring appellant to participate in plethysmograph examination at the direction of his community corrections officer must be stricken or at least clarified that such testing may only be ordered in conjunction with treatment?

11. Whether the community custody condition prohibiting appellant from entering into a relationship with anyone who has minor children is unconstitutionally vague because it does not provide fair warning of proscribed conduct and exposes appellant to arbitrary enforcement?

B. STATEMENT OF THE CASE

1. Procedural Facts

The State charged Jonathan Duenas with one count of first degree child rape and two counts of first degree child molestation against HA, and one count of third degree child molestation against KL. CP 16-17. A jury returned guilty verdicts. CP 39-42. The court imposed a minimum of 175 months confinement. CP 61-62. Duenas appeals. CP 79.

2. Pre-trial hearing on child hearsay

A pre-trial hearing took place on April 10, 2015 to determine whether out-of-court statements made by HA were admissible under RCW 9A.44.120, the child hearsay statute. RP¹ 5²; CP 110-12.

Heather Linden has two daughters, HA (born 2003) and KL (born 1999). RP 32. Linden met Duenas in 2011. RP 32. They started dating

¹ The verbatim report of proceedings is referenced as follows: RP – five consecutively paginated volumes consisting of 4/10/15 (vol. I), 8/3/15 (vol. II - trial), 8/4/15 (vol. III), 9/25/15 (vol. IV), 8/3/15 (vol. V- voir dire and opening statements).

² The hearing also encompassed the issue of whether HA was competent to testify, but there was no dispute that she was competent. RP 5, 43-44.

and eventually got engaged. RP 33. Duenas lived with her family for over a year. RP 33.

HA testified at the hearing that Duenas (referred to as "J.D.") touched her vagina on two occasions. RP 14. The first person she told was her sister, KL. RP 14. She did not remember when she told her sister, what she told her, or where she told her. RP 14-15, 21. HA also told her mother that Duenas touched her. RP 15. It was probably months between telling her sister and telling her mother. RP 15. She subsequently talked to a detective.³ RP 16.

When asked by the prosecutor how she felt about Duenas dating her mother prior to "anything happening" with Duenas, HA said she didn't really know and didn't really have an opinion. RP 16-17. She had no issues with him when she talked to the detective. RP 17. HA knew Duenas and her mother were engaged to be married when she disclosed Duenas had touched her. RP 19. She still loved her biological dad and spent time with him. RP 19-20. On cross-examination, HA denied being unhappy or mad at Duenas. RP 19.

KL also testified at the hearing. She and her sister were fairly close. RP 23. About the middle of June 2013, HA told her that she had

³ HA's statements to the detective fell outside the rule under RCW 9A.44.120 because she had turned 10 years old by the time she made them. RP 7.

something important to tell her while the two were in the shower. RP 24. This occurred not long after the engagement was announced. RP 30. HA seemed nervous, "like she didn't want to tell me, but she wanted to tell me." RP 24-25. KL asked her, and HA said she had been lying in bed, Duenas asked to lie down by her, and he touched her. RP 25. HA pointed toward her vaginal area and mimicked a rubbing motion. RP 25-26. KL asked why she waited to tell anyone, but did not remember if HA gave an explanation. RP 26. KL felt her sister was scared and did not want to tell anybody, but KL decided to tell their mother. RP 26. On July 4, 2013, KL told their mother about what HA had said while driving to the mall. RP 26-27. KL had no big issues with Duenas. RP 28.

Linden testified her relationship with Duenas was great and the kids were happy. RP 33. There were no huge issues or rifts between Duenas and the children. RP 33-34. While driving to the mall on July 4, KL told her that HA said Duenas was touching her "down there." RP 34. Linden immediately drove back home to pick up HA. RP 34-35. She took HA to a park to ask her what was going on. RP 35. She started the conversation by asking "is there anything you would like to tell me." RP 35. HA said no. RP 35. Linden then said "let me make this easy for you. I said your sister has already told me something that I think is really important and you should probably tell me." RP 35. HA started crying.

RP 35. Linden said "is there anything you want to tell me?" RP 36. HA said "Well, no, yeah." RP 36. Linden asked what she meant. RP 36. HA responded Duenas had been touching her and pointed toward her vagina. RP 36. Linden asked when this happened. RP 36. HA said the second time it happened he got in her in bed and started rubbing on her. RP 36. Linden asked if she yelled for help and told him to stop. RP 37. HA said she couldn't, she just froze. RP 37.

The State argued the hearsay statements were admissible under RCW 9A.44.120 because they were reliable. RP 44-45. The State stressed HA had no motive to lie, and the family got along with Duenas. RP 44-48. HA made her disclosure in response to non-leading, non-suggestive questions from both KL and her mother. RP 46. Regarding the mother, she told HA that she knew something happened, but did not specify what that "something" was. RP 47. "She didn't say, I know that J.D. touched you. She didn't say anything like that to give her any kind of indication as to what her response should be. She left it open-ended and simply left it to her to disclose the statements." RP 47.

Defense counsel argued the circumstances showed the statements were unreliable. RP 49. There was a motive to make up the accusation in connection with the recent engagement of Duenas and the mother. RP 49-50. The timing of the statements, coming after the engagement

announcement and long after the incidents allegedly took place, cut against reliability. RP 49-50.

In rebuttal, the State again emphasized HA had no motive to fabricate: "all three witnesses testified that, you know, there wasn't any big looming issues between [HA] or any of the daughters and the defendant. They all seemed happy, and they all testified that before these incidents happened, they really didn't have any issues with him." RP 51-52.

The trial court admitted the hearsay statements, ruling they were sufficiently reliable. RP 54-57. In terms of motive to lie, the girls did not have a problem with Duenas until "this event." RP 54. If HA was trying to sabotage the engagement, it would be expected that she would not have waited to disclose and would have disclosed to her mother rather than to her sister. RP 54-55. The statements were consistent enough. RP 55. The timing factor supported the defense argument, but the court noted its experience that there is frequently a delay. RP 56-57. The mother did not question HA in a suggestive manner. RP 56.

3. Trial evidence

The trial testimony generally tracked the pre-trial hearing testimony, with some exceptions. On July 4, 2013, Linden drove to the mall with her daughter KL and others. RP 120-21. HA was at home with Duenas. RP 122. Before Linden left, HA had thrown a fit because she

wanted to go to the mall but there was no room for her in the car. RP 123-24. While driving, Linden remarked that she hoped HA was going to be okay. RP 123. KL said "yeah, me too." RP 123. Linden asked what she meant by that. RP 124. KL broke down crying and said Duenas had been "messaging" with HA, touching her "down there." RP 124-25. Linden immediately drove home. RP 126. When she arrived, Duenas did not understand why she seemed so upset. RP 127.

Linden took HA to a nearby school. RP 127. She asked HA if there was anything she would like to tell her. RP 128. HA said no. RP 128. Linden then started talking about how her job as a mom was to protect her and that her sister had "already said some things, and *I just want to make sure that they're true.*" RP 128. "So I said, Let me make this easy on you. I was, like, *[K.] told me that J.D. had been touching you.* And I was like, *Is that true?* . . . Is there anything you want to tell me?" RP 128 (emphasis added). HA said no, and then she said "yeah." RP 128. She cried and said he had been touching her "down there," pointing to her vagina. RP 129-30. She said Duenas rubbed her while she was in bed. RP 129-30. She did not give details. RP 130. This happened when Linden was in Louisiana visiting an aunt.⁴ RP 129.

⁴ Linden testified she was in Louisiana from February 23 to 27, 2013. RP 139.

Linden called 911. RP 134. She went home, picked up KL, and returned to the school. RP 132. An officer responded to the call and, after speaking with Linden, referred the matter to a special detective who handled such matters. RP 102-05. Linden returned home and told Duenas to leave. RP 134, 155. Duenas expressed shock and wondered what was going on but left without incident. RP 134-35, 155.

Linden did not see Duenas engaging in secretive behavior with the girls or doing anything inappropriate. RP 152, 159. She was shocked. RP 151. Duenas was a father figure to the girls. RP 152. She never had any concerns. RP 152-53.

According to Linden, the girls were happy and excited about the engagement. RP 160-61. But when asked what the family dynamic was like, Linden said HA had developed a "really bad attitude problem, "very hateful," in the few months leading up to the July 4 disclosure. RP 138. She noticed this was directed towards Duenas "a lot." RP 138. The two could not get along, and "she hated the world." RP 139.

HA testified that she did not "remember exactly" if something happened with Duenas one time or more than one time. RP 193. She described one time in which she was in bed and Duenas asked if he could lie down. RP 194. He touched and rubbed her vagina with his finger under her clothing. RP 194, 197. She did not remember if his finger was

inside or outside her vagina. RP 198. She rolled over on her side and said "stop." RP 198. Duenas left the bed. RP 199. She did not immediately tell anyone about this incident because she was nervous and scared. RP 204. A snippet of HA's recorded interview with the detective was played for the jury at trial, in which she said Duenas put two fingers into her vagina.⁵ RP 244; Ex. 14.

HA thought she remembered a second time that happened before the incident related above. RP 200, 251. Her mother was in Louisiana. RP 200, 251. KL was at a sleepover. RP 200. Her younger brother was home. RP 200. She was in her mom's bed, trying to sleep at night. RP 201. She was in the middle, with her brother on one side and Duenas on the other. RP 202. Duenas touched her vagina under her clothing with his finger. RP 202. She could not remember anything about the touching or whether he touched her inside or outside. RP 203. The touching stopped after she wrapped herself in a blanket. RP 203.

HA later told her sister that Duenas had touched her. RP 205. HA did not remember why she decided to tell her sister. RP 205. After her

⁵ The recording was admitted as a recorded recollection. RP 211-13, 239. It was cued up at the 31:36 mark. RP 240, 316-18.

sister told her mother,⁶ her mother "asked me if he ever did anything, and I didn't answer. And then she asked me again and I told her." RP 206.

KL testified that Duenas touched her two years ago. RP 265. They were watching a movie on the couch. RP 266. Duenas laid down by her ankles, so that his head was at her feet. RP 268. He started rubbing her calves, then moved up her thigh, and then traced the outline of her vagina outside of her clothes with his finger. RP 269-71. She was shocked, confused, and "frozen." RP 271. He stopped touching her, perhaps because he thought she woke up. RP 272.

On the car ride home from the mall, her aunt asked KL if anything happened to her. RP 277. KL told them what happened. RP 277. Linden testified she became aware from speaking to KL that Duenas had touched her "down there" when she was on the couch. RP 130. She did not get any details about what happened. RP 131. KL told her that she and her sister were not going to tell Linden because Linden did not have a job and they would lose their home if Duenas was kicked out. RP 131.⁷

When contacted by the investigating detective by phone, Duenas was cooperative and complied with the request to give a statement. RP

⁶ KL testified that she wanted to tell their mother, but HA did not. RP 274.

⁷ Linden had quit her job to be a stay-at-home mom while Duenas worked. RP 136-37.

313. Duenas, testifying in his own defense, denied inappropriately touching the girls. RP 328-29.

C. ARGUMENT

1. **THE MOTHER'S TESTIMONY THAT HER DAUGHTERS WOULD NOT LIE ABOUT BEING SEXUALLY ABUSED CONSTITUTED AN IMPERMISSIBLE OPINION ON CREDIBILITY AND GUILT, AND THE PROSECUTOR COMMITTED MISCONDUCT IN ELICITING THIS OPINION.**

The prime evidence against Duenas was the word of Linden's children, which the State attempted to bolster with the mother's testimony about her daughters' veracity in making the accusations. That testimony constituted an impermissible opinion on guilt and the credibility of the witnesses. Further, the prosecutor committed misconduct in eliciting this improper testimony. In the event the error is deemed unpreserved for appeal, then defense counsel was ineffective in not objecting to it.

a. **The mother's testimony that she did not believe her daughters were lying invaded the province of the jury.**

On cross-examination, defense counsel elicited testimony from Linden that her children lied once in a while. RP 158. On redirect, the prosecutor noted defense counsel had asked if her kids were occasionally not completely honest and had told a fib or two in their day. RP 159. The prosecutor then asked: "Okay. Now, if they would not be forthcoming with you, would it be about smaller stuff or would it be about *a massive*

issue like this?" RP 159. Linden responded "I think it would be smaller -- I -- *something like this is not something that's just made up or something that they're going to lie about.* It's -- I mean, I can tell, especially when my kids are, like, Well, we weren't going to tell you, but, you know what I mean? Like, it's not something that's just -- yeah. I don't know how to explain it." RP 159-60. The prosecutor then elicited her agreement that, as a parent, she has a history of ferreting out when they're being forthcoming with her and when they're not. RP 160.

No witness, lay or expert, may opine as to the defendant's guilt. State v. Black, 109 Wn.2d 336, 348, 745 P.2d 12 (1987). "Opinions on guilt are improper whether made directly or by inference." State v. Quaale, 182 Wn.2d 191, 199, 340 P.3d 213 (2014). "The right to have factual questions decided by the jury is crucial to the right to trial by jury." State v. Montgomery, 163 Wn.2d 577, 590, 183 P.3d 267 (2008) (citing U.S. Const. amend. VI; Wash. Const. art. I, §§ 21, 22). Linden's opinion that her children would not make up the accusations implicates the right to a fair trial. State v. Johnson, 152 Wn. App. 924, 934, 219 P.3d 958 (2009). Impermissible opinion testimony on guilt "violates the defendant's constitutional right to a jury trial, which includes the independent determination of the facts by the jury." Quaale, 182 Wn.2d at 199.

In vouching for her daughters' testimony, Linden effectively opined that Duenas was guilty of the crimes they accused him of doing. State v. Alexander, 64 Wn. App. 147, 154, 822 P.2d 1250 (1992) ("By stating that he believed M was not lying, Bennett effectively testified that Alexander was guilty as charged.").

Similarly, expressions of personal belief as to credibility of a witness are "clearly inappropriate." Montgomery, 163 Wn.2d at 591. "Unquestionably, to ask a witness to express an opinion as to whether or not another witness is lying does invade the province of the jury." State v. Casteneda-Perez, 61 Wn. App. 354, 362, 810 P.2d 74 (1991). A mother's opinion testimony about her child's credibility in a rape/molestation case is therefore inadmissible. State v. Jerrels, 83 Wn.App. 503, 508, 925 P.2d 209 (1996), review denied, 136 Wn.2d 1011, 966 P.2d 903 (1998).

In State v. Sutherby, the court reversed the convictions because the complaining witness's mother gave an impermissible opinion that she was telling the truth. State v. Sutherby, 138 Wn. App. 609, 158 P.3d 91 (2007), aff'd, 165 Wn.2d 870, 204 P.3d 916 (2009). Sutherby was charged with raping and molesting his granddaughter. Id. at 612. At trial, the mother testified she could tell when her child was fibbing because she makes a sort of half smile, and that the child never made that face when talking about the allegations. Id. at 616-17. On appeal, the court concluded "this

testimony was wholly improper and deprived him of his right to have the jury determine [the child's] credibility." Id. at 617. The mother's testimony was "neither cumulative nor innocuous." Id. at 617-18. The court reversed Sutherby's rape and molestation convictions. Id. at 618.

The mother's opinion testimony in Sutherby is comparable to the mother's testimony here. Linden's expressed opinion that her children would not lie about the accusations is just as direct.

Defense counsel previously elicited testimony from the mother that her children lied once in a while. RP 158. This did not mean the prosecutor was free to ask if her children would lie about the accusation *in this case*. As proper redirect, the prosecutor should have just asked if her children would lie about small or big things generally. What crossed the line is pegging the mother's opinion to the accusations in this case: "would it be about a massive issue *like this*?" RP 159.

The improper opinion testimony is an error of constitutional magnitude, and the State has the burden of proving harmlessness beyond a reasonable doubt. Quaale, 182 Wn.2d at 201-02. Duenas denied the accusations against him. No physical evidence showed whether sexual abuse of the children occurred. As in Sutherby, credibility of the complaining witnesses was the crucial issue in the case. Sutherby, 138 Wn. App. at 617. The mother gave a wholly improper opinion that her

daughters were telling the truth, thereby vouching for their accusations. This opinion impermissibly bolstered a case that was based almost entirely on the word of the children. Duenas's convictions should be reversed.

b. The prosecutor committed misconduct in eliciting the improper opinion testimony.

The error can also be analyzed as prosecutorial misconduct. In Jerrels, the defendant's wife testified that she believed her children were telling the truth when they reported their father had sexually assaulted them. Jerrels, 83 Wn. App. at 507. This error deprived Jerrels of his constitutional right to a fair trial. Id. at 504. "A prosecutor commits misconduct when his or her cross examination seeks to compel a witness' opinion as to whether another witness is telling the truth." Id. at 507. The questions asked "were clearly improper because the prosecutor inquired whether she believed the children were telling the truth." Id. at 508.

The same hold true here. The prosecutor committed misconduct in eliciting the mother's testimony that her children would not be dishonest about "a massive issue like this," i.e., about making sexual abuse allegations against Duenas. RP 159.

c. This issue can be raised for the first time on appeal as manifest constitutional error.

The admission of opinion testimony may be manifest error affecting a constitutional right that a defendant can raise for the first time

on appeal. State v. Saunders, 120 Wn. App. 800, 811, 86 P.3d 232 (2004), review denied, 156 Wn.2d 1034, 137 P.3d 864 (2006); RAP 2.5(a)(3). There was no objection to the improper opinion testimony in Sutherby, but the court reviewed the error.⁸ In Jerrels, the prosecutorial misconduct claim was preserved for review despite lack of objection because the improper opinion testimony was material to the trial's outcome and could not have been remedied by instruction. Jerrels, 83 Wn. App. at 508.

The mother's testimony in the present case was an explicit opinion on her daughters' credibility that violated Duenas's constitutional right to a fair and impartial jury, as well as his constitutional right to have the jury decide the critical facts of his case. Opinion testimony is unfairly prejudicial to the defendant because it invades the exclusive fact-finding province of the jury. Johnson, 152 Wn. App. at 930. "A mother's opinion as to her children's veracity could not easily be disregarded even if the jury had been instructed to do so." Jerrels, 83 Wn. App. at 508. The actual prejudice is that the mother's opinion bolstered the credibility of her daughters' accusations in a case that turned on credibility.

⁸ The decision does not mention an objection. The briefing in the Court of Appeals confirms no objection was made. Available at www.courts.wa.gov; see State v. Rose, 17 Wn. App. 308, 313, 563 P.2d 1266 (1977) (Court of Appeals examined briefs from another case to determine facts not revealed in opinion of that case).

d. Alternatively, defense counsel was ineffective in failing to object to the mother's improper opinion testimony and misconduct in eliciting the testimony.

Duenas is guaranteed the right to effective assistance of counsel. Strickland v. Washington, 466 U.S. 668, 685-86, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); State v. Thomas, 109 Wn.2d 222, 229, 743 P.2d 816 (1987); U.S. Const. amend. VI; Wash. Const., art. I, § 22. Defense counsel is ineffective where (1) the attorney's performance is deficient and (2) the deficiency prejudices the defendant. Strickland, 466 U.S. at 687.

Deficient performance is that which falls below an objective standard of reasonableness. Thomas, 109 Wn.2d at 226. Only legitimate trial strategy or tactics constitute reasonable performance. State v. Kylo, 166 Wn.2d 856, 869, 215 P.3d 177 (2009).

Given the damaging nature of the mother's opinion testimony, there was no sound reason not to object to it. That testimony did not advance Duenas's defense, but rather undermined it. Duenas demonstrates prejudice by showing a reasonable probability that, but for counsel's performance, the result would have been different. Thomas, 109 Wn.2d at 226. As argued, this case boiled down to a credibility contest. Who was telling the truth? Duenas denied touching the girls inappropriately. The girls said he did. There is a reasonable probability sufficient to undermine

confidence in the outcome that the mother's opinion testimony that her daughters would not lie about this affected the verdict.

2. COUNSEL'S FAILURE TO RENEW HIS CHILD HEARSAY OBJECTION FOLLOWING TRIAL TESTIMONY THAT WAS INCONSISTENT WITH TESTIMONY FROM THE PRE-TRIAL HEARING CONSTITUTES INEFFECTIVE ASSISTANCE.

Defense counsel was ineffective in not renewing a challenge to the admission of HA's hearsay statements after her mother testified at trial differently than she did in the pre-trial hearing. At the pre-trial hearing, the mother described using non-leading questions to elicit HA's disclosure, which the trial court relied on to find the hearsay sufficiently reliable. Her trial testimony shows she questioned her daughter in a leading manner, which undercuts reliability. At the pre-trial hearing, no witness identified any animosity harbored by HA toward Duenas, and the court did not find HA had a motive to lie about being abused. At trial, the mother testified HA had developed a bad attitude and did not get along with Duenas. The animosity gave her a motive to lie. Because of the differences in the pre-trial and trial testimony, counsel performed deficiently in not renewing an objection to HA's hearsay statements. Confidence in the outcome is undermined because the hearsay bolstered HA's credibility in a case that came down to who was telling the truth about whether abuse occurred.

A child's hearsay accusations of abuse are generally inadmissible. In re Dependency of A.E.P., 135 Wn.2d 208, 226, 956 P.2d 297 (1998). RCW 9A.44.120 creates an exception to the general rule. Under that provision, the out-of-court statements of a child who testifies at trial are admissible if the court finds "the time, content, and circumstances of the statement provide sufficient indicia of reliability." RCW 9A.44.120(1).

There are a number of non-exclusive factors for determining the admissibility of a child's hearsay statements, including: (1) whether there is an apparent motive to lie; (2) the general character of the declarant; (3) whether more than one person heard the statements; (4) whether the statements were made spontaneously; (5) the timing of the declaration and the relationship between the declarant and the witness; (6) whether the statement contained assertions about past fact; (7) whether cross examination could establish that the declarant was not in a position of personal knowledge to make the statement; (8) how likely is it that the statement was founded on faulty recollection; and (9) whether the circumstances surrounding the making of the statement are such that there is no reason to suppose that the declarant misrepresented the defendant's involvement. State v. Ryan, 103 Wn.2d 165, 175-76, 691 P.2d 197

(1984).⁹ Although each factor need not favor admission of child hearsay, the factors as a whole must be substantially met. State v. Swan, 114 Wn.2d 613, 652, 790 P.2d 610 (1990).

Based on the testimony from the pre-trial hearing, the trial court admitted HA's hearsay statements. RP 54-57; CP 110-12. The trial court noted the delay in disclosure weighed in favor of the defense argument against reliability. RP 56-57; see State v. Swanson, 62 Wn. App. 186, 193, 813 P.2d 614, (1991) ("Although she made the allegations several months after the events allegedly took place, this factor alone is not controlling."). In terms of character, the court acknowledged the mother's testimony that HA might not be truthful on small things, but that was not enough to keep the hearsay out. RP 55. The other factors considered — whether there was a motive to lie, statements to others, and spontaneity of statements — favored admission. RP 54-57. The lack of detail to the allegation does not weigh in favor of reliability. See Swanson, 62 Wn. App. at 193 ("a child victim's explicit descriptions of abuse made the possibility of fabrication remote"). But based on the record produced at the pre-trial hearing, the court did not

⁹ The last four factors have been criticized as redundant of the first five or otherwise unhelpful. In re Dependency of S.S., 61 Wn. App. 488, 498-99, 814 P.2d 204 (1991).

abuse its discretion in admitting the statements because the factors are substantially met.

But Linden's trial testimony differed from her testimony at the pre-trial hearing in important respects. At the pre-trial hearing, Linden described how she questioned HA without even referencing Duenas. None of her questions were suggestive or leading. RP 35-36. The prosecutor, in arguing for admissibility, stressed the mother's open-ended inquiry supported reliability. RP 46-47. The court attached importance to the mother's pre-trial hearing testimony showing she did not suggest an answer. RP 56.

Yet according to Linden's trial testimony, this is what elicited the allegation: her sister had "already said some things, and *I just want to make sure that they're true. . . . [K.] told me that J.D. had been touching you. . . . Is that true? . . . Is there anything you want to tell me?*" RP 128. HA said no, then she said "yeah," and said Duenas had touched her. RP 128-30. Linden used leading language that suggests the answer. It posits the premise ("J.D. had been touching you") and seeks affirmation ("I just want to make sure that they're true," "Is that true?"). This testimony shows HA's statement to her mother was not made spontaneously, which is one of the reliability factors to consider under Ryan. See S.S., 61 Wn. App. at 497 ("any statements made that are not the result of leading or suggestive questions are spontaneous.").

Linden's testimony at trial differed in another way. At the pre-trial hearing, Linden described the relationship between HA and Duenas in uniformly positive terms. RP 33-34. HA, for her part, denied being unhappy or mad at Duenas. RP 19. The prosecutor emphasized there was no motive to lie. RP 44-45. The court acknowledged the defense could argue HA had a motive to fabricate because of the impending marriage, but did not see a "strong enough argument for a motive to lie" to preclude the hearsay. RP 54-55.

At trial, however, Linden testified that HA had developed a "really bad attitude problem, "very hateful," in the few months leading up to the July 4 disclosure. RP 138. Linden noticed this was directed towards Duenas "a lot." RP 138. The two could not get along. RP 139. That testimony supports a motive to lie. See State v. Grogan, 147 Wn. App. 511, 521, 195 P.3d 1017 (2008) (no motive to lie supported trial court's admission of child hearsay: "I heard testimony that [M.L.] got along very well [with Mr. Grogan] . . . I don't see that there was any sort of motive to lie"), remanded on other grounds, 168 Wn.2d 1039, 234 P.3d 169 (2010).

The trial court has discretion in determining admissibility of child hearsay statements, and there is a reasonable probability the court in this case would have exercised its discretion differently had counsel renewed his hearsay objection at trial based on the differing testimony cited above.

Again, Duenas had the right to effective assistance of counsel. Strickland, 466 U.S. at 685-86; Thomas, 109 Wn.2d at 229; U.S. Const. amend. VI; Wash. Const., art. I, § 22. Counsel performed deficiently in not renewing an objection to HA's hearsay statements because there was no legitimate reason for that decision. The hearsay statements bolstered HA's credibility in a case that came down to witness credibility. It was counsel's job to keep those statements out because the jury would naturally view them as strengthening the State's case. When the new information came to light during Linden's trial testimony,¹⁰ competent counsel would have asked the court to reconsider its earlier ruling because the new information implicated two factors showing unreliability of the hearsay statements.

Given the weight attached by the trial court to those factors at the pre-trial hearing, it is reasonably probable the court would have decided to exclude HA's statements had the request to do so been made at trial. See State v. Klinger, 96 Wn. App. 619, 629, 980 P.2d 282 (1999) (in context of whether counsel was ineffective in failing to bring suppression motion, defendant establishes prejudice by showing a reasonable probability that motion would have been granted). The motive to lie factor weighs against the reliability of HA's statements to both Linden and KL. The leading

¹⁰ At trial, Linden testified before HA and KL.

question factor weighs against the reliability of HA's statement to Linden, but HA's disclosure to her sister could still be viewed as tainted by motive to lie.

There was no corroborating physical evidence of abuse. Conviction or acquittal turned on whether the jury believed the children or Duenas. Under the circumstances, there is a reasonable probability exclusion of HA's hearsay statements would have changed the outcome of the case not only for the counts involving HA but also the count involving KL because HA's hearsay statements bolstered KL's version of events by painting Duenas as a serial child abuser. A jury is more likely to convict when they hear evidence of damning statements being made before trial, rather than hearing about abuse allegations made for the first time at trial, because the out-of-court statements serve to corroborate and reinforce what is testified to at trial. Reversal of the convictions is required.

3. PROSECUTORIAL MISCONDUCT IN CLOSING ARGUMENT DEPRIVED DUENAS OF HIS DUE PROCESS RIGHT TO A FAIR TRIAL.

Prosecutorial misconduct can violate the due process right to a fair trial. Greer v. Miller, 483 U.S. 756, 765, 107 S. Ct. 3102, 97 L. Ed. 2d 618 (1987); State v. Davenport, 100 Wn.2d 757, 762, 675 P.2d 1213 (1984); U.S. Const. amend. XIV; Wash. Const. art. 1, § 3. In this case, the prosecutor committed multiple instances of misconduct throughout closing

argument. The cumulative effect of that misconduct denied Duenas his right to a fair trial, requiring reversal of the convictions. In the alternative, defense counsel was ineffective in failing to object to the misconduct.

a. The prosecutor committed multiple instances of misconduct.

The prosecutor began his closing argument as follows: "The defendant *raped* and molested *his soon-to-be stepchildren*. That's a heavy statement to say. That statement has some weight to it. A lot of us go through our daily routines and our daily lives and we don't deal with child sex abuse or don't face it. And that's a very good thing. *It would not be a good society, if we were all dealing with that on a daily basis.*" RP 386.

Prosecutors may not make prejudicial statements unsupported by evidence in the record. State v. Rose, 62 Wn.2d 309, 312, 382 P.2d 513 (1963). Right out of the gate, the prosecutor misstated the evidence and argued a fact not in evidence. There is zero evidence that KL was raped, but the prosecutor included her in the same category as her sister in this regard. A prosecutor may not "mislead the jury by misstating the evidence." State v. Guizzotti, 60 Wn. App. 289, 296, 803 P.2d 808, review denied, 116 Wn.2d 1026, 812 P.2d 102 (1991). When a prosecutor argues facts not in evidence, he becomes an unsworn witness against the defendant. State v. Belgarde, 110 Wn.2d 504, 508, 755 P.2d 174 (1988).

Further, prosecutors may not urge jurors to convict a criminal defendant in order to protect community values. State v. Ramos, 164 Wn. App. 327, 333, 263 P.3d 1268 8 (2011). The prosecutor, by invoking the destruction of a "good society" if people were exposed to sexual abuse of children on a daily basis, implicated the need to protect the community from such actions. "The evil lurking in such prosecutorial appeals is that the defendant will be convicted for reasons wholly irrelevant to his own guilt or innocence. Jurors may be persuaded by such appeals to believe that, by convicting a defendant, they will assist in the solution of some pressing social problem. The amelioration of society's woes is far too heavy a burden for the individual criminal defendant to bear." Ramos, 164 Wn. App. at 333 (quoting United States v. Solivan, 937 F.2d 1146, 1153 (6th Cir. 1991) (internal quotation marks omitted)).

The prosecutor continued: "And it's hard when you're faced with it. And it's hard when you're faced with it not in the abstract. It's easy to sit there and say, I recognize that this happens. It's easy to say that in the abstract. But when it's right there in front of you and you've gotten to know a child because they've testified in front of you, it's not easy to sit there and fully comprehend that that child has had that happen to them." RP 386. The prosecutor posited that's "one of the challenges in prosecuting these cases." RP 386. The State has the hurdle of proving the

case beyond a reasonable doubt, "[b]ut *we also need 12 people to accept that this really did happen. And that's a hard thing to do.*" RP 387. "But *the unfortunate reality is that this stuff happens. It happens to kids every day* and it happened to [KL] and it happened to [H]. And it happened to them at the hands of the defendant." RP 387.

The prosecutor attempted to bolster the believability of the State's child witnesses, and by extension its case against Duenas, by referencing what "happens to kids every day." RP 387. The dangerous suggestion is that the jury should believe the children in this particular case because sexual abuse really happens in other cases. A prosecutor is prohibited from making statements unsupported by the record in an effort to secure conviction. State v. Jones, 71 Wn. App. 798, 808, 863 P.2d 85 (1993), review denied, 124 Wn.2d 1018 (1994). Stated another way, a prosecutor may not "call to the attention of the jurors matters which they would not be justified in considering in determining their verdict." Rose, 62 Wn.2d at 312 (quoting State v. Buttry, 199 Wn. 228, 251, 90 P.2d 1026 (1939)). Whether sexual abuse is committed against other children every day is irrelevant to what the jury in Duenas's case needed to decide, but the prosecutor's invitation to look at the case through that prism unfairly aided the prosecution effort.

In addressing the incident involving KL, in which according to her testimony Duenas starts rubbing her calf while the two watched a movie, the prosecutor commented: "So what's going on at this point? Well, *we can't get inside the defendant's head, but from the evidence, I would argue that what's going on is a couple of possibilities.* One, he's testing the waters. He's rubbing her calf and seeing, okay, A. Is she awake? And B. *Am I going to get some reaction?* Because it's kind of an innocent part of the body. It's not obviously problematic." RP 397-98.

"The State has wide latitude to argue inferences from the evidence," but "a prosecutor commits reversible misconduct by urging the jury to decide a case based on evidence outside the record." State v. Pierce, 169 Wn. App. 533, 553, 280 P.3d 1158, review denied, 175 Wn.2d 1025, 291 P.3d 253 (2012). In Pierce, the prosecutor's first-person narrative as to the defendant's thought process before committing the crime "was an improper appeal to the passion and prejudice of the jury based on facts outside the evidence." Pierce, 169 Wn. App. at 553-54. "By arguing in the first person singular, the prosecutor inflamed the prejudice of the jury against Pierce by attributing repugnant and amoral thoughts to him — thoughts that were based on the prosecutor's speculation and not the evidence." Id. at 554.

The prosecutor did the same kind of thing in Duenas's case. The prosecutor speculated on the thoughts Duenas must have been thinking leading up to the alleged crime, and resorted to a first-person narrative in so doing: "Am I going to get some reaction?" RP 397-98. As in Pierce, that is misconduct because the comment is based on evidence outside the record and is conveyed in an inflammatory manner through the prosecutor acting as Duenas's spokesman for what was going on in his head.

In addressing KL's recitation of what happened to her, the prosecutor honed in on her testimony that Duenas traced her vagina with one finger: "That's detail that I would argue doesn't come out if somebody isn't being truthful about what happened. People -- if somebody were fabricating something, they're not coming up with details like [K.] is coming up with. That's a detail that should send some shivers down some of you. Because that really paints a very troubling picture." RP 398.

Although a prosecutor has wide latitude to argue reasonable inferences from the evidence, he or she must seek convictions based only on probative evidence and sound reason. In re Pers. Restraint of Glasmann, 175 Wn.2d 696, 704, 286 P.3d 673 (2012). "A prosecutor may not properly invite the jury to decide any case based on emotional appeals." State v. Gaff, 90 Wn. App. 834, 841, 954 P.2d 943 (1998). Improper appeals to passion or prejudice include arguments intended to incite feelings of fear,

anger, or desire for revenge and that otherwise prevent calm and dispassionate appraisal of the evidence. State v. Elledge, 144 Wn.2d 62, 85, 26 P.3d 271 (2001).

The prosecutor, in saying evidence of the finger tracing "should send some shivers down some of you," encouraged the jury to have an emotional reaction to the evidence in deciding Duenas's fate. RP 398. People shiver based on what they hear due to fright or horror. A juror's emotional reaction to the evidence has no place in deliberations. The prosecutor's comment invited the jury to succumb to an emotional reaction.

The prosecutor's comment that "That's detail that I would argue doesn't come out if somebody isn't being truthful about what happened" is also improper. RP 398. Prosecutors are forbidden from stating a personal belief as to the credibility of witnesses. State v. Monday, 171 Wn.2d 667, 677, 257 P.3d 551 (2011); Ramos, 164 Wn. App. at 341 n.4 (prosecutor improperly stated personal belief in credibility of witness in arguing "the truth of the matter is [the police witnesses] were just telling you what they saw and they are not being anything less than 100 percent candid.").

This comment was not an isolated affair. In addressing the defense argument that KL was motivated to fabricate the allegation, the prosecutor told the jury "*It's hard for me to comprehend* where in evidence there's support that she had these motivations." RP 427. The prosecutor made it

personal. It doesn't matter whether it is hard for the prosecutor to comprehend. The prosecutor's mental process is irrelevant. But the prosecutor injected his personal view into the case as something for the jury to take into account.

The prosecutor also invited the jury to consider the emotional impact of the crimes on the children and their mother. RP 412-13. This, too, was another invitation to decide the case based on emotion, which is improper. Gaff, 90 Wn. App. at 841. The jury's job is to determine whether the State proved the elements of its case beyond a reasonable doubt. Whether the identified victims and their mother suffered an emotional impact from the crimes for which a defendant stands accused has no proper role to play.

In rebuttal, the prosecutor responded to the defense argument that the children fabricated the allegations by proclaiming "what he is accusing them of doing is absolutely egregious." RP 424. In response to the defense argument that there was no physical evidence that abuse occurred, the prosecutor accused counsel of "rais[ing] the bar for the State to a point where no prosecutor could ever clear that bar." RP 428-29. The prosecutor continued that it did not need DNA evidence to convict, telling the jury "the defense argument can be effective, but *it's misleading* because I don't have to put on a perfect case." RP 430.

A prosecutor can certainly argue the evidence does not support the defense theory, but "a prosecutor must not impugn the role or integrity of defense counsel." State v. Lindsay, 180 Wn.2d 423, 431-32, 326 P.3d 125 (2014). The implication of deception and dishonesty on the part of defense counsel is improper. Lindsay, 180 Wn.2d at 433 (calling counsel's argument a "crook"); State v. Thorgerson, 172 Wn.2d 438, 451-52, 258 P.3d 43 (2011) (referring to defense counsel's presentation as involving "sleight of hand").

The prosecutor's personal opinion that defense counsel's argument was "absolutely egregious" and that counsel was "misleading" the jury improperly impugned the integrity of defense counsel. RP 424, 430. The remark of "what he is accusing them of doing is absolutely egregious" is particularly troublesome. It casts defense counsel in the role of someone who has offended community values: how dare counsel act so unethically as to accuse the children of lying? The prosecutor's moral disapproval of counsel's argument is palpable.

"Prosecutorial statements that malign defence counsel can severely damage an accused's opportunity to present his or her case and are therefore impermissible." Lindsay, 180 Wn.2d at 432. No prosecutor may employ language that "limits the fundamental due process right of an accused to present a vigorous defense." Sizemore v. Fletcher, 921 F.2d

667, 671 (6th Cir. 1990). It is therefore misconduct for a prosecutor to disparage defense counsel's integrity. Lindsay, 180 Wn.2d at 432-33; Bruno v. Rushen, 721 F.2d 1193, 1195 (9th Cir. 1983). The prosecutor did this in accusing Duenas's counsel of misleading the jury and acting egregiously in accusing the children of fabricating the allegations.

b. The error is preserved for appeal and reversal is required because the misconduct prejudiced the outcome.

Defense counsel did not object to the misconduct. Appellate review remains available in the absence of objection if the misconduct is so flagrant and ill-intentioned that no curative instruction could have erased the prejudice. State v. Fisher, 165 Wn.2d 727, 747, 202 P.3d 937 (2009). When applying this standard, reviewing courts should "focus less on whether the prosecutor's misconduct was flagrant or ill intentioned and more on whether the resulting prejudice could have been cured." State v. Emery, 174 Wn.2d 741, 762, 278 P.3d 653 (2012).

Disregard of a well-established rule of law is deemed flagrant and ill-intentioned misconduct. State v. Fleming, 83 Wn. App. 209, 214, 921 P.2d 1076 (1996), review denied, 131 Wn.2d 1018, 936 P.2d 417 (1997). A prosecutor's misconduct is also flagrant and ill-intentioned where case law and professional standards available to the prosecutor clearly warned against the conduct. Glasmann, 175 Wn.2d at 707. Case law in existence

well before Duenas's trial, such as that cited in this brief, clearly warned against the prosecutor's improper conduct in this case.

The misconduct here was not the type to be remedied by a curative instruction. "The criterion always is, has such a feeling of prejudice been engendered or located in the minds of the jury as to prevent a [defendant] from having a fair trial?" Emery, 174 Wn.2d at 762 (quoting Slattery v. City of Seattle, 169 Wn. 144, 148, 13 P.2d 464 (1932)). Statements made during closing argument are intended to influence the jury. State v. Reed, 102 Wn.2d 140, 146, 684 P.2d 699 (1984). Prosecutors, in their quasi-judicial capacity, usually exercise a great deal of influence over jurors. State v. Case, 49 Wn.2d 66, 70-71, 298 P.2d 500 (1956).

The cumulative effect of misconduct can overwhelm the power of instruction to cure. Glasmann, 286 P.3d at 679; State v. Walker, 164 Wn. App. 724, 737, 265 P.3d 191 (2011). Looking at each individual comment in isolation, a case could be made that instruction could have cured any prejudice. But that is not how repetitive misconduct is reviewed on appeal. Repeated instances of misconduct and their cumulative effect must be considered as a whole: "the cumulative effect of repetitive prejudicial prosecutorial misconduct may be so flagrant that no instruction or series of instructions can erase their combined prejudicial effect." Glasmann, 175 Wn.2d at 707 (quoting Walker, 164 Wn. App. at 737). The prosecutor's

cumulative misconduct created a prejudicial force that deprived Duenas of his due process right to a fair trial and could not be cured by instruction.

Reviewing claims of prosecutorial misconduct is not a matter of determining whether there is sufficient evidence to convict. Glasmann, 175 Wn.2d at 710. Rather, the general standard for showing prejudice is a substantial likelihood that the misconduct affected the verdict. Id. at 711. The evidence against Duenas was not overwhelming. It was his word against the word of his accusers. No physical evidence corroborated the children's claims. Under these circumstances, there is a substantial likelihood that the prosecutor's misconduct affected the outcome.

c. In the alternative, counsel was ineffective in failing to object to the misconduct or request curative instruction.

In the event this Court finds proper objection or request for a curative instruction could have cured the prejudice, then defense counsel was ineffective in failing to take such action. Strickland, 466 U.S. at 685-86; Thomas, 109 Wn.2d at 229; U.S. Const. amend. VI; Wash. Const., art. I, § 22. "If a prosecutor's remark is improper and prejudicial, failure to object may be deficient performance." In re Pers. Restraint of Cross, 180 Wn.2d 664, 722, 327 P.3d 660 (2014).

No legitimate reason supported the failure of counsel to properly object and request curative instruction given the prejudicial nature of the

prosecutor's improper comments. The prosecutor's comments were improper. If an objection and instruction could have redirected the jury to the proper considerations and cured the prejudice resulting from the improper comments, then counsel had no legitimate tactical reason for not objecting. See State v. Horton, 116 Wn. App. 909, 921-22, 68 P.3d 1145 (2003) (defense counsel deficient in failing to object to prosecutor's improperly expressed personal opinion about defendant's credibility during closing argument); Burns v. Gammon, 260 F.3d 892, 895-96 (8th Cir. 2001) (had counsel objected and prompted a curative instruction in response to the prosecutor's improper comment, prejudice would have been avoided).

Defense attorneys must be ever vigilant in defending their clients' rights to fair trial, including being aware of the law and making timely objections in response to misconduct. State v. Neidigh, 78 Wn. App. 71, 79, 95 P.2d 423 (1995). Such vigilance is necessary to allow the trial court to cure prejudice at the time of trial, before the jury deliberates. As discussed, established authority already signaled that such arguments were improper. Instead of a timely objection and curative instruction directing to disregard the improper argument, the jury was left to consider them as a proper part of deliberations. No conceivable legitimate tactic explains this choice.

The remaining question is whether defense counsel's deficient performance prejudiced Duenas. "The benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." Strickland, 466 U.S. at 686. There was a basis for acquittal. The less than overwhelming case presented by the State rendered Duenas's trial vulnerable to prejudicial comments unfairly tipping the jury in favor of the State. Reversal is required where defense counsel incompetently fails to object to prosecutorial misconduct and there is a reasonable probability the failure to object affected the outcome. A new trial is required here for that reason.

4. CUMULATIVE ERROR DEPRIVED DUENAS OF HIS CONSTITUTIONAL DUE PROCESS RIGHT TO A FAIR TRIAL.

Every criminal defendant has the constitutional due process right to a fair trial. Davenport, 100 Wn.2d at 762; U.S. Const. Amend. XIV; Wash. Const. art. 1, § 3. Under the cumulative error doctrine, a defendant is entitled to a new trial when it is reasonably probable that errors, even though individually not reversible error, cumulatively produce an unfair trial by affecting the outcome. State v. Coe, 101 Wn.2d 772, 788-89, 684 P.2d 668 (1984); Parle v. Runnels, 505 F.3d 922, 927 (9th Cir. 2007). Even where some errors are not properly preserved for appeal, the

appellate court retains the discretion to examine them if their cumulative effect denies the defendant a fair trial. Alexander, 64 Wn. App. at 150-51.

As discussed above, an accumulation of errors affected the outcome and produced an unfair trial in Duenas's case. These errors include (1) admission of improper opinion testimony, prosecutorial misconduct in eliciting the improper testimony, or ineffective assistance in failing to object to the opinion testimony and misconduct in eliciting it; (2) ineffective assistance of counsel in failing to renew objection to the child hearsay statements; (3) prosecutorial misconduct in closing argument, or ineffective assistance of counsel in failing to object to the misconduct.

5. THE CONVICTION FOR CHILD MOLESTATION UNDER COUNT 2 VIOLATES DOUBLE JEOPARDY AND MUST BE VACATED.

"Multiple convictions and punishments for the same offense imposed in the same proceeding violate the Fifth Amendment prohibition against double jeopardy." In re Pers. Restraint of Strandy, 171 Wn.2d 817, 819, 256 P.3d 1159 (2011); U.S. Const. amend. V; Wash. Const. art. I, § 9. The term "punishment" encompasses a conviction as well as the sentence for purposes of double jeopardy. State v. Turner, 169 Wn.2d 448, 454, 238 P.3d 461 (2010). "When a conviction violates double jeopardy principles, it must be wholly vacated." Strandy, 171 Wn.2d at 819.

Duenas may raise this double jeopardy challenge for the first time on appeal. State v. Mutch, 171 Wn.2d 646, 661, 254 P.3d 803 (2011).

The rape conviction under count 1 and molestation conviction under count 2 are based on the same act. The prosecutor made this clear in closing argument: "Now, both Count 1 and 2 deal with the same incident, so I want to be clear on that. So [H] described two incidents. The first incident, which involved the defendant putting his fingers in her vagina, and that is what's covered in Counts 1 and 2." RP 388-89. Convictions for first degree child rape and first degree child molestation violate double jeopardy when based on the same act. State v. Fuentes, 179 Wn.2d 808, 825-26, 318 P.3d 257 (2014).

Before trial and again during the jury instruction conference, the court recognized the convictions would merge if the jury found Duenas guilty on both. RP 70-71, 352. At sentencing, the molestation conviction under count 2 did not contribute to the offender score for the other convictions but was still listed as a conviction in the judgment and sentence. RP 449 (prosecutor: "Counts 1 and 2 arose out of the same incident . . . So Count 2 does not score."); CP 58. But count 2 received an offender score of 6 and Duenas was sentenced to a term of 130 months of confinement on that count. CP 60, 61.

The molestation conviction under count 2 must be vacated because it is based on the same act as the rape and therefore violates double jeopardy. Fuentes, 179 Wn.2d at 825-26; Strandy, 171 Wn.2d at 820 (remedy is to vacate the lesser conviction). References to that conviction in the judgment and sentence must be stricken. Turner, 169 Wn.2d at 464.

6. THE COMBINED TERM OF CONFINEMENT AND COMMUNITY CUSTODY FOR COUNT 4 EXCEEDS THE FIVE YEAR STATUTORY MAXIMUM.

Third degree child molestation is a class C felony with a statutory maximum sentence of 60 months. RCW 9A.44.089(2); RCW 9A.20.021(l)(c). For count 4, the court imposed 54 months confinement in addition to 36 months of community custody for a combined total of 90 months. CP 61-62. The combined term of confinement and community custody exceeds the 60-month statutory maximum.

RCW 9.94A.701(9) provides "The term of community custody specified by this section shall be reduced by the court whenever an offender's standard range term of confinement in combination with the term of community custody exceeds the statutory maximum for the crime as provided in RCW 9A.20.021." Under this provision, the trial court, not the Department of Corrections, has the obligation to reduce the term of community custody to avoid a sentence in excess of the statutory maximum. State v. Boyd, 174 Wn.2d 470, 473, 275 P.3d 321 (2012). A

notation on the judgment and sentence that the combined term cannot exceed the statutory maximum is insufficient. Boyd, 174 Wn.2d at 472; see CP 62 ("The total time of incarceration and community supervision/custody shall not exceed the statutory maximum for the crime."). The case must therefore be remanded to enable the trial court to reduce the community custody term on count 4 so that the total sentence for that count does not exceed the statutory maximum of 60 months.

7. THE PLETHYSMOGRAPH CONDITION VIOLATES DUENAS'S RIGHT TO BE FREE FROM BODILY INTRUSIONS.

As a condition of community custody, the court ordered Duenas to "submit to plethysmograph exams, at your own expense, at the direction of the community corrections officer and copies shall be provided to the Prosecuting Attorney's Office upon request." CP 76. This condition, as written, is not statutorily authorized and is unconstitutional. This Court should strike the condition or clarify the community corrections officer (CCO) has authority to order plethysmograph testing only for purposes of sex offender treatment.

A court may impose only a sentence authorized by statute. State v. Barnett, 139 Wn.2d 462, 464, 987 P.2d 626 (1999). Whether a trial court exceeded its statutory authority under the Sentencing Reform Act by imposing a community custody condition is an issue of law reviewed de

novo. State v. Murray, 118 Wn. App. 518, 521, 77 P.3d 1188 (2003).
Erroneous sentences may be challenged for the first time on appeal. State v. Bahl, 164 Wn.2d 739, 744, 193 P.3d 678 (2008).

Plethysmograph testing involves the restraint and monitoring of an intimate part of a person's body while the mind is exposed to pornographic imagery. In re Marriage of Parker, 91 Wn. App. 219, 223-24, 957 P.2d 256 (1998). Such examination implicates the due process right to be free from bodily restraint. Parker, 91 Wn. App. at 224; U.S. Const. amend. XIV; Wash. Const. art. 1, § 3.

Requiring submission to plethysmograph testing at the discretion of a community corrections officer violates Duenas's constitutional right to be free from bodily intrusions. State v. Land, 172 Wn. App. 593, 605, 295 P.3d 782, review denied, 177 Wn.2d 1016, 304 P.3d 114 (2013). "Plethysmograph testing is extremely intrusive. The testing can properly be ordered incident to crime-related treatment by a qualified provider." Land, 172 Wn. App. at 605. Such testing is not a routine monitoring tool subject only to the discretion of a community corrections officer. Id. The condition must therefore be stricken. Id. at 605-06. At minimum, this Court should clarify that "the CCO's scope of authority is limited to ordering plethysmograph testing for the purpose of sexual deviancy

treatment and not for monitoring purposes." State v. Johnson, 184 Wn. App. 777, 781, 340 P.3d 230 (2014).

8. THE COMMUNITY CUSTODY CONDITION PROHIBITING DUENAS FROM ENTERING A RELATIONSHIP WITH ANYONE WHO HAS MINOR AGED IS UNCONSTITUTIONALLY VAGUE.

As a condition of community custody, the court ordered "do not enter into a relationship with anyone who has minor aged children residing in or visiting their home without the approval of the therapist and the CCO." CP 78. The condition violates due process because it is insufficiently definite to apprise him of prohibited conduct and does not prevent arbitrary enforcement.

The due process vagueness doctrine under the Fourteenth Amendment and article I, section 3 of the Washington Constitution requires the State to provide citizens with fair warning of proscribed conduct. Bahl, 164 Wn.2d at 752. The doctrine also protects from arbitrary, ad hoc or discriminatory enforcement. State v. Halstien, 122 Wn.2d 109, 116-17, 857 P.2d 270 (1993). A prohibition is therefore void for vagueness if it does not (1) define the offense with sufficient definiteness such that ordinary people can understand what conduct is prohibited; or (2) provide ascertainable standards of guilt to protect against

arbitrary enforcement. Bahl, 164 Wn.2d at 752-53; State v. Sullivan, 143 Wn.2d 162, 181-82, 19 P.3d 1012 (2001).

The condition here does not provide Duenas with adequate notice as to what he is prohibited from doing. What constitutes a "relationship," and what constitutes "entry" into one? Commonly understood, a "relationship" is "a state of affairs existing between those having relations or dealing." Webster Third New Int'l Dictionary 1916 (1993). That conceivably covers an incredible range of human interaction. At what point does an interaction between two people turn into a relationship? Where is the dividing line between passing acquaintance and "entry" into a relationship? The condition, as written, does not give an answer.

Further, what kind of relationship is covered? Is the restriction limited to romantic relationships? The condition doesn't say so. Does it cover mere friendships with those who have minor children? What about professional or therapeutic relationships? The condition requires pre-approval by a CCO without standards, permitting a CCO to bar Duenas from establishing all sorts of relationships of varying depth so long as the other person has a minor child. The condition does not provide Duenas with adequate notice as to what relationships he is prohibited from forming and at what point an interaction becomes a relationship. A

reasonable person cannot describe a standard necessary to avoid arbitrary enforcement.

A condition that leaves so much to the imagination is unconstitutionally vague because it gives too much discretion to the CCO to determine when a violation has occurred. See State v. Sanchez Valencia, 169 Wn.2d 782, 794-95, 239 P.3d 1059 (2010) (striking down prohibition on paraphernalia: "an inventive probation officer could envision any common place item as possible for use as drug paraphernalia,' such as sandwich bags or paper. . . . Another probation officer might not arrest for the same 'violation,' i.e. possession of a sandwich bag. A condition that leaves so much to the discretion of individual community corrections officers is unconstitutionally vague.").

United States v. Reeves, 591 F.3d 77 (2d Cir. 2010) is instructive. Reeves held a condition of supervision requiring the defendant to notify the probation department upon entry into a "significant romantic relationship" is vague in violation of due process. Reeves, 591 F.3d at 79, 81. The court observed "people of common intelligence (or, for that matter, of high intelligence) would find it impossible to agree on the proper application of a release condition triggered by entry into a 'significant romantic relationship.'" Id. at 81. "What makes a relationship 'romantic,' let alone 'significant' in its romantic depth, can be the subject of

endless debate that varies across generations, regions, and genders." Id. The condition had "no objective baseline," as "[n]o source provides anyone-courts, probation officers, prosecutors, law enforcement officers, or Reeves himself - with guidance as to what constitutes a 'significant romantic relationship.'" Id.

The condition in Duenas's case suffers from the same kind of defect, except worse. The condition here is even less specific. The prohibition restricts Duenas's ability to "enter" *any type* of "relationship," not simply "significantly romantic" ones or even "significant" ones. Duenas's freedom during supervised release should not hinge on the accuracy of his prediction of whether a given CCO, prosecutor, or judge would conclude that a proscribed relationship had been entered into.

There is no presumption in favor of the constitutionality of a community custody condition. Sanchez Valencia, 169 Wn.2d at 792-93. Imposition of an unconstitutional condition is manifestly unreasonable. Id. at 792. The condition here is unconstitutional because fails to provide reasonable notice as to what conduct is prohibited and exposes Duenas to arbitrary enforcement. As such, the condition does not meet the requirements of due process and should be stricken.

9. IN THE EVENT THE STATE SUBSTANTIALLY PREVAILS ON APPEAL, ANY REQUEST FOR APPELLATE COSTS SHOULD BE DENIED.

The Court of Appeals has discretion to deny a cost bill even where the State is the substantially prevailing party. State v. Sinclair, 192 Wn. App. 380, 386, 388, 367 P.3d 612 (2016); RCW 10.73.160(1) (the "court of appeals . . . *may* require an adult . . . to pay appellate costs."). The imposition of costs against indigent defendants raises serious concerns well documented in State v. Blazina: "increased difficulty in reentering society, the doubtful recoupment of money by the government, and inequities in administration." State v. Blazina, 182 Wn.2d 827, 835, 344 P.3d 680 (2015). The concerns expressed in Blazina are applicable to appellate costs and it is appropriate for appellate courts to be mindful of them in exercising discretion. Sinclair, 192 Wn. App. at 391.

Duenas qualified for indigent defense services in the trial court and continued to qualify for indigent defense services on appeal. CP 108-09. There is a presumption of continued indigency throughout the review process. Sinclair, 192 Wn. App. at 393; RAP 15.2(f). This Court should soundly exercise its discretion by denying any request for appellate costs.

D. CONCLUSION

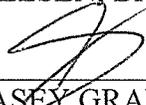
Duenas requests reversal of the convictions. If this Court declines to reverse, the conviction for count 2 should be vacated, the sentence for

count 4 should be reduced, and the challenged conditions of community custody should be stricken or clarified.

DATED this 21st day of May 2016

Respectfully Submitted,

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**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION TWO**

STATE OF WASHINGTON)	
)	
Respondent,)	
)	
v.)	COA NO. 48119-7-II
)	
JONATHAN DUENAS,)	
)	
Appellant.)	

DECLARATION OF SERVICE

I, PATRICK MAYOVSKY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

THAT ON THE 31ST DAY OF MAY 2016, I CAUSED A TRUE AND CORRECT COPY OF THE **BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X] JONATHAN DUENAS
DOC NO. 384687
CLALLAM BAY CORRECTIONS CENTER
1830 EAGLE CREST WAY
CLALLAM BAY, WA 98326

SIGNED IN SEATTLE WASHINGTON, THIS 31ST DAY OF MAY 2016.

X *Patrick Mayovsky*

NIELSEN, BROMAN & KOCH, PLLC

May 31, 2016 - 3:04 PM

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