

48993-7-II
Pierce County No. 14-1-04802-7

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

STATE OF WASHINGTON,

Respondent,

v.

BRANDON BARNES,

Appellant.

ON APPEAL FROM THE
SUPERIOR COURT OF THE STATE OF WASHINGTON,
PIERCE COUNTY

The Honorable James Orlando, Trial Judge

APPELLANT'S OPENING BRIEF

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A. ASSIGNMENTS OF ERROR

1. The trial court abused its discretion in finding the five-year old competent to testify.
2. The child's hearsay statements were inadmissible under RCW 9.94.120.
3. The prosecutor committed misconduct in misstating her burden of proof and the jury's role and shifting a burden to appellant to disprove the state's case.
4. The trial court's decision to seal and limit defense access to Exhibit 12, the forensic interview of the child, was in violation of discovery rules, Articles 1, §§ 10 and 20, GR 15 and the presumption of open, public criminal courts. It further violated the state and federal rights to counsel.
5. The judges' refusal to comply with the presumption of release on personal recognizance violated the requirements of GR 15 and Article 1, §10, and equal protection.
6. The Eighth Amendment prohibition against excessive bail was violated.
7. Mr. Barnes assigns error to the following conditions of community placement/custody contained in Appendix H:
 16. Do not enter into any location where alcohol is the primary product, such as taverns, bars, and/or liquor stores. . . .
 24. Do not go to or frequent places where children congregate, (I.E. Fast-food outlets, libraries, theaters, shopping malls, play grounds and parks, etc.) unless otherwise approved by the Court. . .
 28. You shall not have access to the Internet except for educational or employment purposes at any location in any medium to include cellphones, nor shall you have access to, possess or peruse any sexually explicit materials in any medium. Your sexual deviancy treatment provider will define sexually explicit material. You are also prohibited from joining or perusing any public social websites (Face book, Myspace, Craigslist, etc.), Skyping, or telephoning any sexually-oriented 900 numbers.
 29. Do not patronize prostitutes or any businesses that

promote the commercialization of sex; also, do not go to or loiter at any place where sexually explicit materials are sold.

CP 172-73.

B. QUESTIONS PRESENTED

1. Mr. Barnes was accused of first-degree child rape based solely on the alleged victim's testimony and statements to others.
 - a. Did the trial court err and abuse its discretion in finding the five-year-old competent to testify even though she did not know the difference between a truth and a lie, was unable to say why it was important to tell the truth on the stand, was inaccurate in relating objectively verifiable facts about contemporaneous events and had inconsistencies in her statements which went to more than "credibility?"
 - b. Were the child's hearsay statements to others inadmissible under RCW 9.94A.120 because she was not competent and there was insufficient corroborating evidence of the crime? Were they further inadmissible under the statute because the trial court failed to properly conduct the required analysis of "reliability?"
2. Did the prosecutor commit flagrant, prejudicial misconduct and misstate the burden of proof and jury's role by repeatedly telling jurors that they should convict because there was no evidence that the state's witnesses - including the accuser - had a motive to lie and make up the accusations?
3. Did the trial court err in sealing a DVD exhibit containing the state's forensic interview of the child despite the presumption of openness, without making the required findings under GR 15 and Article 1, §§ 10 and 20, where the DVD was used as evidence of guilt at trial and did not contain any prohibited depictions?
4. Was it a violation of discovery rules, due process, Article 1, §§ 10 and 20 and the right to counsel for the trial court to place extensive limits on the ability of the defense to have access to and use of a DVD containing the crucial forensic interview of the accuser?

5. Were GR 15 and Article 1, § 10 violated when the judges did not apply the presumption of release on personal recognizance even though appellant was cloaked with the presumption of innocence? Did the judge further violate the rule and constitutional provisions against excessive bail by setting the bail amount so high that the indigent defendant could not meet it, thus keeping him in custody based solely on his poverty in violation of equal protection?
6. Were conditions 16, 24, 28 and 29, improper where they were not supported by statute, not crime-related, and which further infringed upon fundamental rights without evidence the conditions were necessary to an important governmental need?

C. STATEMENT OF THE CASE

1. Procedural Facts

Appellant Brandon Barnes was charged in Pierce County with two counts of first-degree rape of a child. CP 1-2; RCW 9A.44.073. Pretrial proceedings were held on December 2 and 19, 2014, January 16, February 6, September 11 and October 9, 2015, and February 19, 2016.¹ Jury trial was held before the Honorable Judge James Orlando on March 10, 14-17, 21-23, 2016, and Barnes was acquitted of one count but convicted of the other. CP 137-38. On May 20, 2016, Judge Orlando ordered a standard-range indeterminate sentence of 100 months to life. CP 155-70. Mr. Barnes appealed and this pleading follows. See CP 174.

2. Testimony at trial

In September of 2014, Keshia Vaetoe had decided to get a “new life” for her and her daughter, T, born March 24, 2010, and then four years old. 8RP 326-27, 351. Vaetoe arranged to transfer to a job in Las Vegas, Nevada and, about mid-September, moved away. 8RP 351-52. She left

¹References to the verbatim report of proceedings are explained in Appendix A.

her daughter in the care of Vaetoe's mom, Francesca Heard. 8RP 329-30.

Although Vaetoe initially denied it, she ultimately admitted that she had planned to take T with her, but had been talked out of it by her mom. 8RP 352-53, 361-62. Vaetoe also admitted that she had drawn up a document giving Heard only temporary authority over T and making it clear Vaetoe was not giving T up to Heard. 8RP 361-63. In fact, she had it notarized. 8RP 363.

One weekend, Vaetoe learned that Heard was going to go on vacation for a few days and was planning to leave T with a friend of Heard's, Darlene Quins. 8RP 364, 513-15, 532-33. Vaetoe also found out that her mother had actually already left for the vacation - and that it was in Vegas, the same town Vaetoe was in. 8RP 336, 513-15, 533. Yet Heard had not called her daughter to tell her she was coming to town or arrange to meet. 8RP 533.

Vaetoe then decided not to have T go stay with Quins. 8RP 336. Instead, she made arrangements for T to go stay with Vaetoe's cousin, Tahjiere Smith. 8RP 336. Smith had two kids close in age to T and T would sometimes go play with them at Smith's house. 8RP 336-47. Also living there was the father of those two kids, Brandon Barnes, who had been with Smith for about ten years. 8RP 336. After arranging the details with Smith, Vaetoe then simply "informed" Heard that T was not to stay with Quins and would instead be going to Smith's house - without Heard having been consulted. 8RP 533.

A few days after Heard came back from that weekend vacation, she took T over to the home where Heard's disabled mom was living. 8RP

496-510. Heard admitted she had noticed nothing “odd” or “unusual” about T’s behavior since Heard’s return. 8RP 537.

Sonya Jones, Heard’s niece, was living at that home. 8RP 416-18, 428-33. Jones would later testify that she was lying in bed, sick, when T came and crawled in. 8RP 436. They were snuggling together and T said she was sad. 8RP 435-38. Jones asked why and the four-year old said, “Brandon did something.” 8RP 437.

At that point, Jones started questioning T, establishing that she was talking about Barnes, not another “Brandon” they knew. 8RP 437. According to Jones, T was gesturing to “[t]he vaginal region” and said he “touched” her. 8RP 437-38. Despite T’s extreme youth, Jones thought the child could understand the questions Jones was asking. 8RP 465-66. At trial, Jones related that T said Barnes had called her into the back bedroom, closed the door, “started to take her underwear off and laid her on the ground and proceeded to touch her.” 8RP 437-38. Jones also said the child told her “she was trying to scream, but he had his hand over her mouth.” 8RP 438. Jones testified T said he laid on top of her and “proceeded to move up and down.” 8RP 438.

Jones did not ask T whether Barnes had his clothes on during the incident. 8RP 451-52. On cross-examination, she admitted that she had specifically asked T “whether or not he stuck anything inside her[.]” 8RP 464-65. T’s response was “[n]o.” 8RP 465-66. Jones conceded that this meant there was “[n]o penetration to my knowledge.” 8RP 465.

Because she was shocked, Jones made the child repeat herself and tell the story again, questioning her about it. 8RP 438-39. Indeed, they

spoke for 20-25 minutes. 8RP 440. At trial, Jones would not initially reveal that, before any allegations were raised, Jones and T had been watching a television show about people in prison called, “Locked Up.” 8RP 450. Jones also did not recall telling police that T had asked questions about the show, prior to making her allegations. 8RP 450.

An officer who later took Jones’ statements confirmed, however, that Jones had reported watching that show and talking with T about people doing bad things and going to jail before T said she was sad. 8RP 581-82.

After Jones established that T had not told anyone else, Jones ordered T to “go tell Momo right now.” 8RP 438. Jones then got out of bed, put T on her hip and ran down the stairs calling for Heard. 8RP 438. When Heard appeared, Jones told her, “[y]ou need to talk to T[]” and that Barnes “did something.” 8RP 438.-39.

Jones was sure Heard took T into another room and talked to the child for “[p]robably about 20 minutes” about it. 8RP 439. Heard, however, said she talked to the child in the hallway, not a separate room. 8RP 512-16.

Neither Heard nor Jones could recall the exact words T used. 8RP 517, 545. The general statement from Heard was that T said Barnes took her in the room, told her to lay down on her stomach and “pulled her panties down and laid on top of her.” 8RP 516-17. Heard also recalled there was something about pennies on the floor. 8RP 516-17.

Heard’s lack of recollection of specific words affected the claims. 517. For example, she first said T reported Barnes taking T into the room.

8RP 517. But Heard admitted she did not know if T said he “took” her there or called her in. 8RP 517. Heard also testified that T said he had pulled down her “panties.” 8RP 538. In a pretrial interview, however, she had used the word “pants.” 8RP 538. When confronted with that fact, Heard maintained that the court reporter recording that interview must have made a transcription mistake. 8RP 538.

A moment later, Heard made the same allegation about the police officer who took her sworn statement. 8RP 538-39. That statement said “pants.” 8RP 538-39. The police officer who took it confirmed his recollection that Heard had pants - not “panties.” 8RP 644. Also in the statement, Heard was clear that T had not said anything about her underwear being off or any penetration. 8RP 540-41, 645.

Heard yelled for Jones and was “bawling her eyes out.” 8RP 440. The two women then compared notes about what T had said. 8RP 440, 461. In her sworn statement to police, Heard would claim that she then “immediately” called the police emergency number, 9-1-1. 8RP 645. Actually, she called Smith, demanding she put Barnes on the phone. 8RP 44-41, 516. Over defense objection, Heard testified that Smith refused. 8RP 516, 518-19.

Heard’s next call was not to police, either. 8RP 343-44. Instead, crying and upset, Heard called Vaetoe and told her T had said Barnes had “touched” her. 8RP 343-44. Vaetoe testified at trial that her mom did not give her the “full detail” but said she was going to take T to the police. 8RP 375. Heard also told Vaetoe about calling Smith, saying it was “to let her know what type of man she was dealing with[.]” 8RP 376.

An officer came and took a report from Heard and a forensic interview and exam were set up. 8RP 344, 382, 520, 543. The interview was done by a part-time “child forensic interviewer” with the prosecutor’s office, Patricia Mahaulu-Stephens. 8RP 659, 664. She testified that she never “set out” to get a disclosure of abuse from a child but just “to receive a clear statement from the child based on whatever the allegations are.” 8RP 665-66. While she admitted she used leading questions, Mahaulu-Stephens said she did not do so unless she then gave a child an opportunity go to “free recall.” 8RP 667-68. That way, she said, “[r]esearch shows” children doing that “are speaking from their own memory” and there is no question Mahaulu-Stephens was “suggesting an answer.” 8RP 667-68.

At trial, Mahaulu-Stephens described using “ground rules” with kids, such as telling a child they could correct the interviewer if she got something wrong. 8RP 670-61. She also said, “ground rules again have been used through research to prove whether or not children’s statements can be accurate or whether or not we will be able to understand what they’re trying to talk to us about and explain to us.” 8RP 671. The interviewer then told the jury that there had been “research . . . to show that that [sic] elicit to tell the truth is the same thing as me holding my hand up here in court and knowing that I’m going to tell the truth today.” 8RP 672. Ultimately, however, Mahaulu-Stephens admitted that getting a child to promise to tell the truth does not necessarily guarantee that they will. 8RP 696.

The interviewer opined that disclosure by a child is “a process,”

because it takes time for the child “to kind of identify who’s going to believe and what the outcomes are going to be.” 8RP 677-78. She said that, in her “training and experience,” kids who made multiple disclosures to different people over time would not always “say the same exact thing every time.” 8RP 678. She also admitted that the way the child is questioned might “trigger” another recall or disclosure in the child, including if the adult has a particular reaction. 8RP 678-79.

Mahaulu-Stephens also testified about “coaching.” 8RP 680. She said it was “the same thing as if you were coaching a baseball team,” and it involved “teaching somebody how to do something.” For “forensic interviewing,” she said, it involves “teaching a child to make a disclosure of abuse.” 8RP 680. Mahaulu-Stephens testified that coaching would occur if “whoever has some kind of relationship with the child that they want a certain outcome by teaching the[child] to make certain statements.” 8RP 680.

Mahaulu-Stephens then declared that she was “trained” to look for “indicators” of coaching, describing some. 8RP 680. Indeed, she said, her interviews were “designed” with awareness of the possibility of coaching and “to minimize that[.]” 8RP 680. She linked the use of “ground rules and the promise to tell the truth” with the use of narrative questions as serving that purpose. 8RP 680.

The prosecutor asked Mahaulu-Stephens questions about younger children, eliciting that, because they often focused on “different things,” their descriptions of sexual abuse might seem “different.” 8RP 682. If a child used an “adult description,” she said, “that might indicate that

somebody else told them” what to say. 8RP 682. Over defense objection as to “leading,” “speculation,” and “that’s for the jury to decide,” Mahaulu-Stephens was allowed to say that T had used language “typical” of a four-year-old. 8RP 689-90. The interviewer also said that “research and . . . peer review” showed that children are not always emotional when disclosing abuse. 8RP 683.

Mahaulu-Stephens testified that, when she interviewed T on December 1, 2014, the four-year-old was “pleasant.” 8RP 88. The interviewer opined that T seemed “to understand what the ground rules were.” 8RP 688. Mahaulu-Stephens also told the jury she “utilized the procedures and methods” she had discussed when interviewing the child. 8RP 690. Over defense objection, she was allowed to opine that T’s strange discussion of timing in the interview and her answers which did not make sense were not “unusual” for a child T’s age. 8RP 693, 695.

The interview was played for the jury. 8RP 696; Ex. 12. In the interview, Mahaulu-Stephens started by asking if T had anything to eat that day. 8RP 696. The child responded she had lunch and a snack at school. 8RP 696-97. But Mahaulu-Stephens then followed up to verify that T had gone to school that day and T said, “no.” 8RP 697. In the interview, T ended up saying the Barnes had tried to put his “boomerang” in her and that it had felt “weird” when it came out.

Michelle Breland, a pediatric nurse practitioner, questioned T while doing a physical exam later that day. 8RP 606-613. Breland asked the four-year-old something had been done to her body and T said yes, to her “hip.” 8RP 615. The child seemed to point, however, to her “anal

area.” 8RP 615. Breland also said that T said something happened to the “part where the pee pee comes out.” 8RP 615. But T also said that it did not hurt and her body was fine. 8RP 615-16.

At trial, Breland would relate that T said her pants and panties had been taken down. 8RP 615-16. As with Mahaulu-Stephens, T was not upset as she related the claims of abuse. 8RP 616-17.

Breland admitted that the physical findings were all “normal” and there was no evidence that penetration had occurred. 8RP 617-18. She testified, however, that “the body heals” and “genital tissue is very vascular.” 8RP 617-22. Ultimately, Breland admitted that the lack of evidence could also be an indication that no sexual contact had occurred. 8RP 631.

Darlene Quins, the mother of Heard’s boyfriend, knew T and was so attached to the child she called herself, Quins, T’s “grandma.” 8RP 460-71. Quins knew about the allegations and the interviews of the child 8RP 476-77. Despite lacking any training, Quins decided to question the four-year old herself about the alleged abuse. 8RP 477, 481-82. By this time, T had talked to Jones, Heard, Mahulu-Stephens and Breland. 8RP 477.

It was Quins, not the child, who brought up the topic, urging the four-year-old to “tell” “grandma” and encouraging T that she would not get in trouble if she did. 8RP 477-78, 487. According to Quins, T then told her Barnes had taken her to the room, pulled down her pants and laid on top of her. 8RP 477-78.

At trial, Quins also claimed that she asked the child why she did

not scream during the incident and T had said it was because he had put his hand over her mouth. 8RP 478. But Quins had never made this claim before - not to police or in any interview before trial. 8RP 482-83. In fact, Quins conceded, before trial she had said, to the contrary, that she asked why the child did not scream and T had said she was afraid, not that he had covered her mouth. 8RP 483-84. Quins maintained that her testimony was more accurate because she was “really still upset” about the incident at the time she spoke to the defense. 8RP 482-83. That defense interview occurred nearly a year after the alleged abuse. 8RP 482-83, 490.

Quins admitted that she questioned the child about what happened, asking details until T was so upset she was crying. 8RP 478-79, 487, 497. Quins was herself upset and hurt, but said she tried not to let the four-year-old see how “grandma” was feeling. 8RP 479. Later, Quins was touching the child between her legs to dry her off after a bath and T said something about it hurting. 8RP 477-78. Quins apologized, saying she had forgotten that T said something had happened down there. 8RP 477-78.

At trial, Quins would admit that she really did not remember exactly what T said or the words T used. 8RP 479.

T did not remember talking to Quins. 8RP 39-697. At trial, the child, who was five years old, could not give any description of her favorite part of her favorite movie. 8RP 397. She could not remember if she went to daycare when she lived with Heard - the time the incident occurred. 8RP 398. She was unable to answer when asked whether her grandma was in the courtroom. 8RP 399.

Most of the questions asked by the prosecutor on direct were

leading, such as “[d]o you ever go over to her house,” “do you call her grandma,” “have you ever spent the night at her house,” and “[h]as it been awhile since you have seen your cousins?” 8RP 403-404. T was unable to identify Barnes in the courtroom, until shown a “booking” photo. 8RP 404-405.

Regarding the allegations, the prosecutor asked T, “the last time that you were over at your cousin’s house,” “did their dad Brandon do something to you that you didn’t like?” 8RP 405-406. T said “yeah,” and ultimately said he had called her into the room, told her to lay on her stomach on the floor and laid on top of her. 8RP 408-409.

At first, T testified that her clothes were halfway off “because of him.” 8RP 409-410. When asked what that meant, she said, “[b]ecause like I was laying down and that’s when he got up. They weren’t loose. It was just - - I don’t know.” 8RP 410. T did not remember “how they got like that,” but knew she was wearing underwear and they stayed on. 8RP 410. She could not really remember at first, but ultimately remembered she was wearing pants and a shirt. 8RP 410.

T did not see any of his body parts. 8RP 412. She was also sure that none of his body parts touched any of hers. 8RP 412. When asked, “[w]hat did he do when he laid on top of you,” she responded, “[h]e just laid on top and nothing else happened.” 8RP 412. It felt uncomfortable and she did not like it. 8RP 413-14.

T did not remember why he got up but, when he did, she went back to the living room to go watch TV with her cousins again. 8RP 412.

The prosecutor asked if T said anything during the incident and she

responded that she only said, “[c]an you pull my pants back up.” 8RP 411. T then volunteered, “[a]nd the other day he made me lay down and he made me count quarters and I didn’t want to.” 8RP 411-412. The following exchange then occurred:

[PROSECUTOR]: Did you say another day, a different day?

A: Yeah. It was a different day. It was like when I went over there and I went there and I slept, and so the last night - - well, like when it was morning time, he went in the morning and he made me count quarters and I didn’t want to.

Q: Where did he make you count quarters?

A: In the same room.

Q: All right. Did anything else happen when he made you count quarters that you didn’t want to have happen?

A: No.

Q: Did your clothes stay on when you had to count quarters?

A: Yes.

8RP 412.

D. ARGUMENT

1. THE TRIAL COURT ABUSED ITS DISCRETION IN FINDING T COMPETENT AND IN ADMITTING HER STATEMENTS UNDER RCW 9A.44.120

The entire case against Mr. Barnes depended on the word of T, a five-year-old child. But that child was not competent to testify at trial and her statements to others were not admissible under RCW 9A.44.120. Because those statements and T’s testimony were the sole evidence used to convict Barnes, the conviction cannot stand.

While hearsay evidence is not usually admissible, there is a

statutory exception allowing the state to introduce the testimony of a child and of others to whom he spoke about allegations of sexual abuse. RCW 9A.44.120; see State v. Ryan, 103 Wn.2d 165, 175-76, 691 P.2d 197 (1984). Before such statements are admissible, first, the trial court must find that they are “reliable,” and second, the child must either testify or be deemed legally “unavailable.” Id. If a child is “unavailable” to testify at trial, the statements she made to others are not admissible unless there is sufficient corroboration of the crime. Ryan, 103 Wn.2d at 176; RCW 9A.44.120.

A child who is not competent to testify is “unavailable.” Ryan, 103 Wn.2d at 176. As a result, questions of competency to testify and admissibility of hearsay under RCW 9A.44.120 are intertwined, and the Court must start with competence. See State v. Bishop, 63 Wn. App. 15, 21, 816 P.2d 738 (1991), review denied, 118 Wn.2d 1015 (1992). In general, a competency determination is reviewed for abuse of discretion, because the trial court has the opportunity to see the witness, his manner and demeanor in person. See State v. Brousseau, 172 Wn.2d 331, 340, 259 P.3d 209 (2011); State v. C.J., 148 Wn.2d 672, 770, 63 P.3d 765 (2003). At the same time, however, it is crucial that only competent witnesses stand as accusers - especially where the only evidence is that accusation. See State v. Avila, 78 Wn. App. 731, 737, 899 P.2d 11 (1995).

The test for determining competency in this state is well-settled. See State v. Waldon, 148 Wn. App. 952, 966-67, 202 P.3d 325, review denied, 166 Wn.2d 1026 (2009). Under RCW 5.60.050, a person who

“appears incapable of receiving just impressions of the facts. . .or of relating them truly” is incompetent to testify in our courts of law. In 1986, the Legislature eliminated the statutory recognition of a difference between a child and an adult in relation to competence, which had created a presumption of incompetence for children under age 10. See Laws of 1986, ch. 195, § 2.

With a child witness, however, the statute is also informed by whether the court has found the child had:

(1) an understanding of the obligation to speak the truth on the witness stand; (2) the mental capacity at the time of the occurrence concerning which he is to testify, to receive an accurate impression of it; (3) a memory sufficient to retain an independent recollection of the occurrence; (4) the capacity to express in words his memory of the occurrence; and (5) the capacity to understand simple questions about it.

State v. Allen, 70 Wn.2d 690, 692, 424 P.2d 1021 (1967).

Each of the five elements of the Allen test is “critical to a determination of competency.” Jenkins v. Snohomish Cnty. Pub. Util. Dist. No. 1, 105 Wn.2d 99, 102-103, 713 P.2d 79 (1986). If even one of the elements is missing, that is dispositive. See Matter of Dependency of A.E.P., 135 Wn.2d 208, 223, 956 P.2d 297 (1998).

There is no question that, in general, the determination of whether a child is competent is an area of the law where the appellate courts must be able to rely on the trial court’s judgment as that court sees the witness testify. See id. Nevertheless, in determining whether to find an abuse of discretion, this Court looks *not just* at the record of the competency hearing, but the entire record, including trial. Brousseau, 172 Wn.2d at 340.

Applying the Allen factors here, even with the great deference given to the trial court's discretion, the trial court abused that discretion in finding T competent. Because there was no corroborating evidence, let alone "sufficient" to support the conviction, reversal and dismissal is required. In addition, even if the child had been competent, the trial court admitted statements in error without properly evaluating them under RCW 9.94A.120 and the error is not "harmless."

a. Relevant facts

At the child hearsay hearing, T was first on the stand but quickly had to be excused. 8RP 70-71. She wanted her mommy and was having trouble, could say but not spell her name and was not responding to questions. 8RP 72. The prosecutor tried to coax the child, telling her "we will get this done much faster if you just answer," and imploring, "[c]an you do that for me?" 8RP 72-73. When the child did not respond, over defense objection, the prosecutor was allowed to call a different witness. 8RP 72-76.²

Later, T retook the stand with a teddy bear and picture, seated so she could see her dad. 8RP 118. After a few initial questions, the following exchange occurred:

[PROSECUTOR]: All right. T[], do you know the difference between telling the truth and telling a lie?

A: No.

Q: No, you don't know the difference? Has anyone talked to you about telling the truth and telling a lie?

²Counsel objected that the charges should be dismissed if the child was unwilling or incapable of testifying. 8RP 72-76.

A: Yeah, my teacher did.

Q: What did your teacher tell you about it?

A: She told me not to lie, because my mom she put my phone into my backpack because in case of emergency.

8RP 120. T then said her teacher told her “not to lie to her.” 1RP 120.

A moment later, T was asked by the prosecutor, “[s]o do you think it’s better to tell the truth than to tell a lie?” 8RP 121. The child did not answer. 8RP 121. The prosecutor then moved on, “[h]as your mom ever talked to you about telling the truth and telling a lie?” 8RP 121. T said, “[s]ometimes.” 8RP 122.

But when asked what her mom told her about telling the truth or telling a lie, the child could not recall. 8RP 122.

The prosecutor next asked T it was “the truth” or “pretend” that the prosecutor was dressed like a clown, or that T had arrived at court that morning on a unicorn. 8RP 122. When asked if the prosecutor could “ask you if you’re talking in here today can you tell us the truth,” the child responded, “[y]es.” 8RP 122. The prosecutor then elicited “yes” and “no” in asking T if she would “promise” not to “tell us anything” that was a lie or pretend and whether she knew what a promise was. 8RP 122-23.

When asked if she could promise, T said “[y]es.” 8RP 122. She also said “[y]es” when asked if it was important to keep your promises. But when asked *why* it was important to keep promises, T could not say. 8RP 122.

Other highlights of the testimony:

- 1) She confused her nickname and her real name (8RP 119)

- 2) A week away from turning six, she could not name the name of the city in which she lived (8RP 119)
- 3) When asked if she had neighbors, she said, “[n]ot very much” (8RP 123)
- 4) She did not know where she went to school or the name of her school, was in kindergarten and knew her teacher was named “Mrs. Felix” (8RP 124)
- 5) When asked “[w]ho is Sonie,” she responded, “[s]he’s kind of my aunt, but I don’t really know because, yeah, I don’t live with her” (8RP 127)
- 6) She was excited about her birthday to dress up as a mermaid and turn six, but had no memory of her birthday from the previous year, when she turned five, even though it occurred after the alleged abuse (8RP 128)
- 7) Her answers often did not track very well, such as when she was asked if her “momo” had another name she answered, “[y]es, sometimes my uncle, but he’s a kid. Her name is Chessy” (8RP 130)
- 8) T could not remember living with “Momo” before going to Vegas - the time when the alleged abuse occurred (8RP 130-131)
- 9) T first said she had not talked to anyone else about the allegations before trial (8RP 133), then said, “[n]o, only sometimes I told my mom and, yeah,” and then, when led, said she told her Mom, mom and Jones (8RP 134)
- 10) T did not remember the forensic interview even when asked twice (8RP 134)
- 11) She did not remember talking to Quins about it (8RP 134)

Jones, Heard, Vaetoe, Quins and Maululu-Stephens all testified about the circumstances of T’s declarations to them, essentially consistent with what they said at trial. 8RP 147-50. Jones first said T told her Barnes had called her to the bedroom, closed the door, touched her, pulled down her underwear and laid her on the floor. 8RP 149. But a moment later, Jones admitted she did not recall T actually saying anything about

her pants being pulled down. 8RP 150. Jones also conceded she did not ask if Barnes had his pants off. 8RP 159.

Jones also reported the child said she was trying to scream and he covered her mouth, laid on top of her and “proceeded to rub up and down on her.” 8RP 150. On cross-examination, Jones specifically remembered that she asked T “if he put anything in her,” and that the child had responded, “no, he did not.” 8RP 158, 170.

Jones refused to answer many questions asked by counsel for Barnes. 8RP 155-70. She admitted she had smoked marijuana and gotten “high” both before her pretrial deposition and before testifying that day. RP 166-67. She could not recall exactly when she had smoked earlier that day. 8RP 169-70. She maintained, however, that doing so had no effect on her memory or recall. 8RP 169-70.

Jones admitted that she had questioned T, asking whether T was “telling me a story or telling me the truth” and “[a]re you sure you’re telling me the truth?” 8RP 150. Once the child said she was a few times, Jones had T repeat the entire story again. 8RP 150, 159. Jones then took T downstairs and yelled that Heard needed to talk to T “right now.” 8RP 151-52.

Like Jones, Heard could not recall exactly the words T used. 8RP 91-92. Heard thought the child generally said it was that Barnes had called T into the room, pulled down her pants, laid on top of her and would not let her up. 8RP 91-92, 105.

But Heard told officers that T said nothing about whether her underwear were on. 8RP 106. Heard also did not recall T saying anything

about anything going inside of her or touching her. 8RP 105-106.

Also like Jones, Heard questioned T about whether the four-year-old was telling the truth. 8RP 112. Heard recalled saying something to T like, “as long as she is telling the truth, there will not be any issues.” 8RP 94, 112-13, 116. Heard did not recall saying in a pretrial interview that she spoke to T at least twice about the incident before ultimately calling police. 8RP 112. Heard admitted that, since the first disclosure, she “might have asked” T “for more details” at some time since. 8RP 93.

Heard admitted she had spoken to T about “telling the truth and telling lies” in the past, when T lied about something. 8RP 83. Heard gave examples such as T lying about writing on a wall, and said, “kids will if they think they’re in trouble, change the story.” 8RP 84-85. Heard thought that, when she caught her granddaughter lying, the truth would usually come out, and T did not lie about really “significant” things. 8RP 85. Although Heard first opined that T “generally” told the truth, on cross-examination, Heard admitted her granddaughter “can lie,” will do so “if she thinks it’s going to get out of trouble,” had an imagination, “could make things up,” and liked to play “pretend.” 8RP 85, 114-15.

T’s mom, Vaetoe, said she had talked to T about the claims at least three times. 8RP 199, 213. Vaetoe remembered very few details about any of the conversations. 8RP 199, 213. She did not know where the first conversation occurred, what day it was or how it happened except to say that T just came up and told her mom details on her own. 8RP 199-200.

Vaetoe admitted, however, that she had questioned the child, using what she thought were “appropriate” questions. 8RP 199-200.

Vaetoe thought the second conversation had occurred about two years before trial, after they had moved back to Tacoma. 8RP 213-14. Again, she recalled no details of where, when, what day, what she was doing or the actual language used, but just said T just spontaneously “came up and told me.” 8RP 213-15.

Vaetoe declared that she taught her child “right from wrong in my opinion,” as well as not be “afraid to tell the truth” even if it hurts somebody. 8RP 195-96. Vaetoe maintained she had never had a problem with her child lying and said T did not “just fabricate stories.” 8RP 196. Vaetoe was confident in her relationship with her child and said “[w]e speak, so there’s no reason for her to lie to me.” 8RP 196.

Darlene Quins admitted bringing up the issue with the child and questioning her about the claims sometime after the forensic interview had occurred. 8RP 174, 177, 182, 187. By that time, T had already gone through the forensic interview. 8RP 177-79, 187. Quins believed she knew “how to talk to kids, you know,” but conceded she had no training in forensic interviewing. 8RP 179, 185. Instead, Quins maintained, it was “parental” and “[g]randmotherly instinct.” 8RP 186. She maintained she did not improperly suggest anything to the child, although she admitted that she started to cry when T started talking and T then started to cry after that, too. 8RP 180-81.

Unlike Heard, Quins said she “never” had any issues with T lying, that the child “knew the difference already” and never had to be punished for lying. 8RP 176-78. Quins said T would generally follow the rules. 8RP 177-78.

Mahaulu-Stephens testified the forensic interview, saying T was able to respond to questions appropriately and seemed to understand them. 8RP 235. The interviewer thought T was a pretty typical four-year-old. 8RP 236. Mahaulu-Stephens asked T “if she promised to tell me the truth today,” and the child said she would. 8RP 236. T was excited about a pair of gloves she had just been given on the way to the interview and wanted to put them on. 8RP 236.

Mahaulu-Stephens declared, “I don’t think there’s any concern that she’s fabricating allegations,” because the interviewer did not “note” any evidence of “coaching” in the interview. 8RP 237-38. The interviewer explained the nonsensical things the child said in the interview, saying, for example, that pee comes out of “her potty and her hip.” 8RP 246-447. To Mahualu-Stephens, this nonsensical statement was actually evidence of “non-coaching,” because it did not make sense but was a child’s way of describing something. 8RP 247. The interviewer also thought that it was developmentally appropriate when the child said he tried to put his “boomerang” into her “potty,” and that it was “smooshy or gooey.” 8RP 247.

Mahaulu-Stephens conceded her job was not to determine if the child was telling the truth. 8RP 255. The interviewer admitted knowing that, when there was a false memory, people actually believe the memories and adopt them as if real. 8RP 261.

b. The five-year-old was not competent

Even with the “great deference” an appellate court usually gives to a trial judge’s determination of competency, Judge Orlando’s conclusion

that T was competent compels reversal, taking each Allen factor in turn. First, the judge applied the wrong legal standard in making the determination on the first factor. He concluded that T had an “understanding and the knowledge of her obligation to speak the truth on the witness stand.” 8RP 287. Although conceding that the child had “some difficulty answering directly the question, do you know the difference between truth and a lie, will you promise to tell the truth,” Judge Orlando thought this was remedied by the fact that she seemed to indicate an “understanding of the differences between fiction and reality.” 8RP 287.

But being able to identify a physical fact, like what someone is visibly wearing, as “true” or to say that you did not ride an imaginary creature to court is qualitatively different than understanding telling the truth and telling a lie. Competency depends upon the child’s “appreciation of the difference between truth and falsehood as well as of [the child’s] duty to tell the former.” State v. S.J.W., 170 Wn.2d 92, 101, 239 P.3d 568 (2010), quoting, Wheeler v. United States, 159 U.S. 523, 524, 16 S. Ct. 93, 40 L. Ed. 244 (1895). And T’s testimony at the hearing showed she did not, in fact, understand either. She said “no” when asked if she knew the difference between the truth and a lie. Her teacher told her not to lie to the *teacher*, not at all. 8RP 120. T could not remember what her mom said about telling the truth and lying. 8RP 121.

She could not answer when asked if she thought it was better to tell the truth than a lie. 8RP 122.

While the child said “yes” when asked if she would “promise” not

to “tell us anything” that was a lie or pretend, and “yes” that she knew what a promise was, T could not say why it was important for her to keep a promise. 8RP 122-23. And she never said anything indicating that she understood the obligation to tell the truth on the stand - or that there were potential consequences for failing to comply. Compare, State v. Sardinia, 42 Wn. App. 533, 713 P.3d 122 (1986) (child knew the difference between a truth and a lie and knew would be in trouble with mom if told a lie); C.J., 148 Wn.2d at 770 (child knew the difference between a truth and a lie and knew that telling a lie would get you spanked); State v. Pham, 75 Wn. App. 626, 630, 899 P.2d 321 (1994) (child knew the difference between a truth and a lie and was able to accurately relate information about a car accident which occurred at around the same time).

Where, as here, the child does not know the difference between a truth and a lie and does not know why she should tell the truth at trial, the first Allen factor is not met. As a result, the child was not properly found competent and this Court should so hold.

Judge Orlando also abused his discretion in finding the second Allen factor, that T had the “mental capacity” at the time of the incident “to receive an accurate impression” of events. 8RP 287. The judge said that, despite her difficulties on the stand, in the forensic interview the child was “verbally agile,” because she had complimented the examiner on her clothing and seemed to notice details in the room. 8RP 287.

Thus, it again appears that the judge applied the wrong standard. The “mental capacity” Allen factor requires the court to find the child could “receive just impressions and accurately relate events” at the time of

the incident - not whether she was loquacious or comfortable in an interview. See State v. Przybylski, 48 Wn. App. 661, 665, 739 P.2d 2d 1203 (1987).

Further, the “mental capacity” determination looks at objective facts the child relates, such as a significant event close in time, and allows an inference if there is accuracy as to those facts. See Pham, 75 Wn. App. at 630. A court may infer that a child has the required capacity “[s]o long as the witness demonstrates by her answers to the court an ability to receive just impressions of and accurately relate events which occurred at least contemporaneously with the incidents at issue.” Przybylski, 48 Wn. App. at 665.

Thus, where a 9 year old knew the difference between a truth and a lie but forgot her birthday, the name of her school and where she lived, the court nevertheless properly found that she had sufficient mental capacity, because she accurately described an auto accident she was in around the same time, correctly naming who she was with, where it occurred and the injuries she suffered. Pham, 75 Wn. App. at 630. And it was proper where the children were able to provide “details of contemporaneous events and circumstances which demonstrated” the required mental capacity, such as recalling the living situation prior to or after the abuse. State v. Woods, 154 Wn.2d 613, 620, 114 P.3d 1174 (2005).

Here, however, T repeatedly demonstrated her *inability* to accurately recall contemporaneous events. First, she said she did not talk to others about Barnes before the child hearsay hearing. 8RP 121-22. When the prosecutor then queried, “[y]ou never talked to anybody about

it,” the five-year-old responded, “[n]o, only sometimes I told my mom and, yeah.” 8RP 131-32. Over defense objection, the prosecutor led, “[d]id you tell your Momo?” and “[d]id you tell Sonie?” 8RP 132. The child responded, “[y]es.” 8RP 132. But she then did not recall talking to Quins. Or doing the forensic interview. Or being in a room where she was told a camera was recording. 8RP 134.

T also was unable to remember significant events, like her 5th birthday the year before - only a few months after the alleged abuse. T was sure that she never saw her grandma, or “Momo,” at Christmas three months before trial, but both her grandmother and mom said she had. 8RP 98-99, 128-29, 206-207. The five-year-old maintained at the hearing, “[n]o, it was only me and my mom and my dad.” 8RP 129.

Most telling, T did not recall living with her grandma “Momo” at all. 8RP 130-31. But it was while she was living with Heard, “Momo,” that it was alleged the abuse occurred. 8RP 581. T did not demonstrate “an ability to receive just impressions of and accurately relate events which occurred at least contemporaneously with the incidents at issue” - she demonstrated that she was *not* so able. The trial court’s conclusion that Allen factor two was met does not withstand review.

T’s inability to recall and accurately relate concurrent and subsequent significant events also are relevant to Judge Orlando’s conclusion on Allen factor three, that the child had “sufficient memory” to retain an independent recollection of the events. 8RP 287-88. The judge found T had such memory because she was able to answer questions about where she was living at the time of trial and, relating to the incident, “what

happened shortly after that.” 8RP 287-88.

While she knew approximately where she was living at the time of trial, however, T *did not recall where she lived at the very time the incident allegedly occurred*, not remembering living at that time with her grandma. 8RP 130-31. Yet T was living away from her mother for the first time in her life. And this was the very same time the alleged rape was said to have occurred. She also forgot or misstated who she had talked to about the alleged abuse. 8RP 130-31. She did not remember the forensic interview or being in a room with someone who told her there was a camera. 8RP 134. She did not remember talking to Quins, which occurred just after the forensic interview. 8RP 134.

It is important to note that T was only four years old when the alleged incident occurred, and five at trial. While the Allen factors do not include consideration of age, in other realms our state’s laws recognize that children do not have the same capacity to understand consequences or know right from wrong as an adult. See RCW 9A.04.050 (children under eight categorically “incapable of committing crime; eight to 12 presumed incapable unless state proves “they have sufficient capacity to understand the act or neglect, and to know that it was wrong”). And our understanding of the cognitive abilities of children has dramatically changed since the competency statutes was rewritten in 1985. See, e.g., J.D.B. v. North Carolina, 564 U.S. 261, 231 S. Ct. 2394, 180 L. Ed. 2d 310 (2011).

In response, the prosecution may attempt to convince the Court to treat the very significant problems with multiple Allen factors in

this case by arguing that any inconsistencies in what the child said went to “weight, not admissibility.” Such an argument should fail. In some cases where the child was otherwise competent, the fact her testimony was “not entirely consistent” on minor details was an issue of credibility, not competence. See State v. Woodward, 32 Wn. App. 204, 208, 646 P.2d 135, review denied, 979 Wn.2d 1034 (1982). But in Woodward, the child was able to identify a lie, knew she would get in trouble if she told one, and showed she had sufficient memory to retain an independent recollection of events. Id. Further, the “inconsistencies” were not about *how the crime occurred*. Id.; see also, Woods, supra (where the child said her bedroom was upstairs even though the house only had one story but was “quite consistent concerning the acts of sexual molestation”).

There is no question there were multiple inconsistencies relevant to credibility in this case, such as who told “Momo,” T or Jones. But the inconsistencies in relation to the alleged crime are so significant that they are relevant to competency, not just “weight.” T repeatedly said nothing went inside her and her underwear stayed on. 8RP 410-12, 465. She said she never saw or felt any part of his body touch any part of her body. 8RP 410-12. But at the same time, in the forensic interview, she said he tried to put his “boomerang” in her and it felt weird and squooshy. Ex. 12.

There is a real difference between a witness who is competent but gives some inconsistent details and a witness who simply does not grasp that what they are describing or saying is a contradiction, because of their lack of competence. The inherent contradictions in what T said about her underwear staying on, nothing inside her and not feeling any part of his

body touch any part of hers vs. the “boomerang” comment cannot all be the truth - showing a fundamental lack of competency to understand that concept. And that lack of competency was reflected in the child’s admission that she did not know the difference between the truth and a lie below.

Because the child was not competent to testify, the statements were not admissible under RCW 9A.44.120. Where a child is not competent to testify, her out-of-court statements alleging sexual abuse are only admissible if the court first finds that (1) the circumstances under which the child made the statements provided “sufficient indicia of reliability” *and* (2) there is sufficient corroborative evidence of the alleged abuse. State v. Swan, 114 Wn.2d 613, 621-22, 790 P.2d 610 (1990), cert. denied, 498 U.S. 1046 (1991).

Taking the second question first, there was, in fact, no corroborative evidence. The only evidence against Mr. Barnes came from T’s word. Because T was not competent, the statements she made to Jones, Heard, Vaetoe and Quins were inadmissible.

Notably, the trial court’s decision to admit the statements she made to others was in error for another reason. In general, such a decision is reviewed for abuse of discretion. State v. Kennealy, 151 Wn. App. 861, 879, 214 P.3d 200 (2009), 168 Wn.2d 1012 (2010). A court abuses its discretion when it makes a decision which is “manifestly unreasonable” or based on “untenable” grounds or reasons. Id. Further, a court abuses its discretion if it misapplies a legal standard. State v. Rohrich, 149 Wn.2d 647, 654, 1 P.3d 638 (2003).

To determine whether the “reliability” requirement of RCW 9A.44.120 is met, the trial court must consider the following:

- (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 it is 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.

Ryan, 103 Wn.2d at 175-76. There is only “[a]dequate indicia of reliability” to support admission of a child’s out-of-court accusation if the factors as a whole have been substantially met. Swan, 114 Wn.2d at 652.

That standard was not met here. First, the trial court failed to consider each disclosure on its own merits, instead just rolling them together, finding that the statements to Jones were spontaneous and reliable and thus assuming all subsequent statements were, too. 8RP 288-89. But “[a]dequate indicia of reliability must be found in reference to circumstances surrounding the making” of each of the statements individually. See State v. Stevens, 58 Wn. App. 478, 486, 794 P.2d 38, review denied, 115 Wn.2d 1025 (1990).

In addition, the court could not make such an evaluation for *any* of the statements to Vaetoe. It is logically impossible for a court to determine if the “time, content and circumstances” of a child’s statement to a witness was made in circumstances showing sufficient “reliability” under RCW

9A.44.120 when the witness cannot recall when, where and how the statements were made, or what exactly was said.

As for Quins, she admitted not having training but just relying on “instinct” in questioning the child until both she and the child were crying. The U.S. Supreme Court has recognized that unreliable statements are made when a person “with a preconceived idea of what the child should be disclosing” conducts the interview of the child and “blatantly leading questions” are used. Idaho v. Wright, 497 U.S. 805, 813, 110 S. Ct. 3139, 111 L. Ed. 2d 638 (1990).

The trial court abused its discretion and erred in finding T competent and admitting her testimony and hearsay statements at trial. The conviction should be reversed. The only evidence against Mr. Barnes came from T’s words - both at trial and before trial, to others. But T was not competent to testify, and there was no corroborating evidence, let alone “sufficient” such evidence, to support admitting the statements she made to others under RCW 9.94A.120 as a result. The trial court further failed to properly determine “reliability” before admitting the testimony of Vaetoe and Quins. This Court should reverse and dismiss the conviction.

2. THE PROSECUTOR’S MISCONDUCT COMPELS REVERSAL

A prosecutor is not like other attorneys; she is a quasi-judicial officer. State v. Charlton, 90 Wn.2d 657, 664-65, 585 P.2d 142 (1978); Berger v. United States, 295 U.S. 78, 88, 55 S. Ct. 629, 79 L. Ed. 2d 1314 (1935), overruled on other grounds by, Stirone v. United States, 361 U.S. 212, 80 S. Ct. 270, 4 L. Ed. 2d 252 (1960). Because of her position, she is

endowed with the public's trust and confidence. State v. Monday, 171 Wn.2d 667, 676-77, 257 P.3d 551 (2001); Donnelly v. DeChristoforo, 416 U.S. 637, 94 S. Ct. 1868, 40 L. Ed. 2d 431 (1974). This trust comes with the price of a heightened duty, not just to the victim or public but also to the accused. Monday, 171 Wn.2d at 676-77. The prosecutor must therefore work to ensure a fair trial and a proper verdict, rather than acting like a "heated partisan" and try to "win" a conviction at all costs. See id. In this case, the prosecutor fell far short of those duties and reversal is required.

a. Relevant facts

In closing argument, in referring to direct versus circumstantial evidence, the prosecutor told the jurors that the instruction on circumstantial evidence "tells you. . .that you can use your common sense. In other words, don't disregard what makes sense to you and don't just accept something - - " 8RP 744. Counsel objected, "[t]hat's not what the law says," but was overruled. 8RP 744.

The prosecutor then told the jurors about "circumstantial and direct evidence," using the example of making a plate of brownies. 8RP 744. The prosecutor gave jurors the scenario of leaving brownies in the kitchen to cool, seeing a five-year old look at them intensely and walk away. 8RP 744. If the brownie stack looks shorter, the prosecutor said, the child is on the couch in the other room watching TV, "remote kind of sticky, the smell of chocolate," and a "little smear" on the child's face, the prosecutor said, "[t]hat's circumstantial evidence for you that the kid ate the brownies." 8RP 744.

The prosecutor then went on:

Are there other possibilities, other explanations for this brownie theft? Possibly. Child points to the golden retriever at his feet. Sammy did it. Possible explanation. Does it match what you know, what you've seen in your common sense? In other words, don't disregard a reasonable explanation just because other possibilities and other explanations might exist.

8RP 744.

Throughout initial closing argument, the prosecutor also emphasized the state's theory that the case was a "swearing match" between the child and state's witnesses and the defense. First, regarding T, the prosecutor said, "if you believe her, you're satisfied beyond a reasonable doubt." 8RP 747-48. Then, the prosecutor told the jurors they had to determine credibility, which required them to "specifically think about her motive" as a child, going on:

I submit to you she was four. **She has absolutely no motive to fabricate what happened to her, what the defendant did to her. At four years old, she's too young to have a motive to create something like this. There is also no evidence before you, none presented, to suggest a reason why she would.**

8RP 750 (emphasis added). Counsel objected "[t]hat's shifting the burden," but the court just said, "the state has the burden to prove the elements of the crime beyond a reasonable doubt." 8RP 750-51.

The prosecutor then said that there was "[n]o evidence she felt any particular way about the defendant himself," and "[n]ot to mention a four-year-old does not have the knowledge base or the experience to come up with something like this on her own." 8RP 751. The prosecutor declared, "[s]he has no motive to do so and no discernable bias against this person." 8RP 751.

A little later, the prosecutor told jurors it was their "job to weigh the

credibility of all of the witnesses” and to do it they should “think about what motive they have, motive to make up what T[] told them.” 8RP 755. The prosecutor again declared there was “[a]bsolutely no evidence of any ongoing dispute between” the state’s witnesses and Barnes or Smith, “none.” 8RP 756. The prosecutor went on:

None of these people may be people that you chose to hang out [with]. Someone like Sonya Jones, maybe you didn’t like her attitude on the stand. That very well may be. But in this case, what she had to say, what all of them had to say that’s relevant to this case, **there’s nothing to show that they have any reason to fabricate it, to make up what T[] told them, none.** You heard T[] in her forensic interview and on the stand, you know, she told Sonie first and then Sonie had her tell Mom. **There just is no evidence for this being fabricated by any of them.**

8RP 756 (emphasis added). The prosecutor asked the jurors to “make inferences and use your common sense” to decide that it was not “unusual” for people to not remember exact details a year or so later, declaring “it doesn’t make them any less credible.” 8RP 757. She then went on:

[PROSECUTOR]: Again, it has nothing to do with any potential reason why they would make this up. The theory that Ms. Heard or anyone else told T[] to say this to make up these allegations is unsupported by any evidence, and it also doesn’t make sense.

[COUNSEL]: Again, Your Honor, I’m going to object. This is shifting the burden. First of all, Your Honor, it’s shifting the burden.

8RP 758. The court said, “[t]he instructions tell the jury their duty is to base their decision upon the facts proved and the state has the burden of proving each element of the crime beyond a reasonable doubt, and that the lawyers’ statements are not evidence.” 8RP 757.

The prosecutor also urged the jurors to disregard difficulties in T’s

testimony at trial as opposed to because the courtroom is “very intimidating” and “scary,” she was being asked to talk in front of stranger and, “also being asked to talk in front of the defendant, the person who abused her.” 8RP 751-52.

The prosecutor admitted that there was no evidence other than T’s word, then went on:

Other evidence doesn’t exist in this case, but, ladies and gentlemen, it does not have to. If you believe T[]’s words, if you believe her description of what happened to her, what the defendant did to her, you are convinced beyond a reasonable doubt.

8RP 761. Counsel objected, “[t]hat’s not the standard,” but the court overruled, saying, “the jury has been advised as to what the standard is.”

8RP 761. The prosecutor then went on:

If the law required that there be more, if the law required that in addition to T[] saying it happened to her, there had to be some other piece of evidence, physical evidence, forensic evidence, whatever, it would be in your instructions, and it’s not there. The law does not require that there is something more. If you believe her, you find her credible, that is your purview, **that is your job to determine**. If you believe her, you are satisfied beyond a reasonable doubt to convict the defendant.

8RP 761-62 (emphasis added).

In rebuttal closing argument, the prosecutor again told jurors that there was “[n]ot a shred of actual evidence” to show that Heard had coached the child. 8RP 798. The defense was faulted for trying to make Jones “look bad, “ but the prosecutor declared, “[s]he had no reason to come in here and make any of this up.” 8RP 802.

What this all comes down to - - . . . is did Francesca coach T[] into saying this. . . . There simply is no evidence to support that. There is no evidence that T[] was actually, in fact, coached and no evidence that Francesca Heard did this. There is nothing tying her to her

being mad and wanting to seek revenge against the defendant and Tahjere. It doesn't make any sense.

8RP 802-803. The prosecutor concluded, "when it comes down to it, thinking that Ms. Heard is the orchestrator behind all this doesn't make sense. T[] had no reason to make this up, and there's no evidence that she was coached." 8RP 804.

b. The arguments were serious, prejudicial misconduct

These arguments were all serious, prejudicial misconduct which compel reversal. On appeal, the defendant bears the burden of establishing first that the remarks or conduct was improper and second that there is a substantial likelihood the misconduct affected the verdict. See State v. Belgarde, 110 Wn.2d 504, 507, 755 P.2d 174 (1988). Allegedly improper comments are viewed in the context of the total argument, issues in the case, evidence the improper argument goes to and instructions given. State v. Stith, 71 Wn. App. 14, 18, 856 P.2d 415 (1993).

There is no question that prosecutors are given wide latitude to argue facts in evidence and reasonable inferences flowing therefrom. See State v. Smith, 104 Wn.2d 497, 510, 707 P.2d 1306 (1985). The statements here, however, fell far outside that scope. The prosecutor repeatedly, over defense objection, shifted the burden. The accused has no burden to rebut the state's case. See In re Winship, 397 U.S. 358, 361-64, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970); State v. Byrd, 125 Wn.2d 707, 713, 14, 887 P.2d 396 (1995).

Here, the prosecutor repeatedly told the jury that it should convict Barnes because there was "no evidence" presented at trial to prove that T

had a motive to lie when she said Barnes had abused her. 8RP 750, 751, 756. The prosecutor also told jurors over objection that, in doing “their job” and weighing credibility, they had to “think about what motive” the state’s witnesses had to make up the claims - and the lack of any evidence to prove such a motive. 8RP 755-56 (“no evidence” of ongoing dispute which would show motive to lie), 758 (lack of evidence of “any potential reason why they would make this up”), 798 (“[n]ot a shred of actual evidence” to show coaching, “no reason” for Jones to “come in here and make any of this up”), 802-803 (no evidence T coached or motive for any coaching), 8RP 804 (“T[] had no reason to make this up, and there’s no evidence that she was coached”).

At the same time, the prosecutor told jurors, also over objection, that it was their “job” to determine if T was credible, and if so, to convict. 8RP 802-803. Ultimately, the prosecutor told jurors, the entire case came down to the question of “did Francesca [Heard] coach T[] into saying this.” 8RP 802-804. The prosecutor told the jurors, again, there was “simply no evidence” of such coaching and no evidence of a motive to make up the claims. 8RP 802-804.

With these arguments, the prosecutor shifted the burden to Mr. Barnes - and relieved herself of the full weight of her own. This type of argument is a type of “false choice” misconduct. It is well-settled that it is “misleading and unfair to make it appear that an acquittal requires the conclusion” that the prosecution’s witnesses are lying or “making up” their version of events. State v. Casteneda-Perez, 61 Wn. App. 354, 362-63, 810 P.2d 74, review denied, 118 Wn.2d 1007 (1991). The argument

presents a “false choice,” because jurors need not make such a finding in order to acquit even if the versions of events patently conflict. See State v. Barrow, 60 Wn. App. 869, 876, 809 P.2d 209, review denied, 118 Wn.2d 1007 (1991). Instead:

[t]he testimony of a witness can be unconvincing or wholly or partially incorrect for a number of reasons without any deliberate misrepresentation being involved. The testimony of two witnesses can be in some conflict, even though both are endeavoring in good faith to tell the truth.

Casteneda-Perez, 61 Wn. App. at 362-63. The argument also misstates the jury’s duties, because jurors are not tasked with deciding “which side” to believe but instead with determining if the prosecution has proven its case beyond a reasonable doubt. State v. Wright, 76 Wn. App. 811, 824-26, 888 P.2d 1214, review denied, 127 Wn. 2d 1010 (1995).

Thus, it was reversible error to tell the jury that they had to choose between “mutually exclusive” versions of events in order to decide the case, even though the only two people in the room testified to conflicting stories. State v. Miles, 139 Wn. App. 879, 882, 162 P.3d 1169 (2007). In Miles, the prosecutor argued in closing that the state and defense witnesses could not both be “correct,” and that jurors should use their “experience and . . . common sense to decide which version of events . . . heard over in this courtroom over the course of this trial is more credible.” 139 Wn. App. at 889-90. This Court found these arguments were misconduct by presenting a “false choice” and shifting the burden. 139 Wn. App. at 890. The jury is “entitled to conclude that it did not necessarily believe” the defense, the Court pointed out, but still not be “satisfied beyond a reasonable doubt” that the state had proven its case. Id. Similarly, here, the

prosecution urged jurors to rely on their “common sense” and used a hypothetical minimizing reasonable doubt by comparing the certainty needed to figure out who ate some brownies with the certainty needed to convict. See State v. Anderson, 153 Wn. App. 417, 424, 429, 220 P.3d 1273 (2009), review denied, 170 Wn.2d 1002 (2010) (condemning such comparisons).

There is an exception where the defendant takes the stand and gives a version of events inconsistent with that of another witness at trial. Wright, 76 Wn. App. at 826. In those limited circumstances, the prosecutor may argue that, in order to *believe* the defendant, the jury would have to find the state’s witnesses *mistaken* - rather than lying. Wright, 76 Wn. App. at 826. Such argument is permissible because it does not effectively tell the jurors they have to find the state’s witnesses are lying if they choose not to convict. Id.

Here, however, Mr. Barnes did not take the stand. And the prosecutor did not argue that jurors would have to find T and the others were *mistaken*. She argued that they should find Barnes guilty because of the lack of evidence to prove that he was not, i.e., that T had a motive to lie or had been coached. She also told them that it was their “job to determine” whether T was credible, because it was dispositive. 8RP 761-62.

The kind of “false choice” arguments in this case mislead the jury about their duty, function and role and improperly relieve the prosecution of the full weight of its constitutional burden. The jury did not have to decide T was intentionally lying or had been coached to do so by someone

with a motive in order to decide the case. They were tasked with deciding if the state had proven the essential elements of the crime, beyond a reasonable doubt. Put another way, the jury had to acquit if they had a reasonable doubt that the inconsistent, completely uncorroborated claims of the then-four-year old were sufficient to prove guilt beyond a reasonable doubt in a court of law.

The prosecutor's arguments relieved herself of the full weight of her burden by not only shifting it to Mr. Barnes but also by shifting the nature of the jury's decision itself. Throughout trial, the prosecutor effectively cast the case as a "swearing match," a sort of balancing decision about who to believe. 8RP 761-62, 802. The arguments in closing did not occur in isolation -and were not mere slips of the tongue. Instead, they represented the state's entire theory of the case.

Pretrial, in urging the court to allow impeachment of Barnes with a very old prior conviction, the prosecutor repeatedly stated the case was a "he said she said," with the only possible defense, "I did not do this, ergo, victim fabricated it either on her own for reasons unknown or because she was coached to do so by somebody else." 8RP 36-37. The prosecutor also said the case was about "the credibility of these two people." 8RP 38.³ And in arguing that testimony on "coaching" should be admitted, she again said the case "comes down to a he said, she said." 8RP 44-45.

In fact, the prosecutor corrected counsel for suggesting that the case

³The judge found that the burglary of a taco stand as a 20-year old many years ago had "very, very low probative value" and "would be of very little benefit to the jury." 8RP 38-39. It thus refused to find an exception to ER 609. 8RP 39.

was not about “who do you want to believe.” 8RP 46-47. The prosecutor was clear that the entire case was about “I believe this kid or I don’t believe this kid.” 8RP 49-50. And she explored this theme at length and over defense objection during juror voir dire, setting up a hypothetical where there is no evidence, just the victim’s “word against whoever the accused is,” and saying, “[i]t’s one person’s word against another.” 9RP 202-203, 234-35, 248-49, 289-90. The jury could not have escaped the theme that they had to pick a side.

Thus, in addition to shifting the burden to Mr. Barnes to *prove* that the accuser and witnesses against him were lying (or the child was coached), and to supply some motive to explain, the prosecutor misstated the constitutional mandate of proof beyond a reasonable doubt by converting it to something less. Arguments tasking jurors with choosing “which version of events is more likely true, the government’s or the defendant’s,” water down the awesome burden the state must bear of proving guilt beyond a reasonable doubt. See United States v. Gonzalez-Balderas, 11 F.3d 1218, 1223 (5th Cir.), cert. denied, 511 U.S. 1129 (1994). Such argument misleads the jury into thinking their job is to decide which version of events they think is more likely to be true - a “preponderance” standard - rather than focusing on whether the state has met its burden of proof. Id.

Reversal is required. Counsel’s repeated objections below are clear evidence that the prosecutor’s comments appeared improper and prejudicial when made. See e.g., State v. McKenzie, 157 Wn.2d 44, 53 n. 2, 134 P.3d 221 (2006). Further, the objections preserved the issue, so that

the Court does not ask if the misconduct is “so flagrant, ill-intentioned and prejudicial” that it could not have been cured by instruction. See State v. Emery, 174 Wn.2d 741, 760-61, 278 P.3d 653 (2012). Instead, the Court asks only if there is a “reasonable probability” that the misconduct affected the verdict. See id.

There is more than such a probability here. A “reasonable probability” is one sufficient to “undermine confidence in the outcome.” State v. Crawford, 159 Wn.2d 86, 104-105, 147 P.3d 1288 (2006). It involves a low standard of proof, less than a “preponderance of the evidence.” See State v. Riofta, 166 Wn.2d 358, 376, 209 P.3d 467 (2009) (Chambers, J., concurring in dissent). To determine if such a probability exists, the Court asks if it can be confident that the misconduct had no effect on the verdict. See, e.g., State v. Boehning, 127 Wn. App. 511, 532, 111 P.3d 899 (2005). That finding cannot be made where, as here, there is no evidence of the crime other than the word of a child and the misconduct directly misstated the basis upon which the jury should decide to convict, as well as the constitutional burden of proof. Even if reversal and dismissal is not granted, this Court should reverse for a new trial, because there is more than a reasonable probability that the serious, prejudicial misconduct affected the verdict in this case.

3. DISCOVERY RULES, ARTICLE 1, §§ 10 AND 20,
GENERAL RULE 15 AND THE RIGHTS TO OPEN,
PUBLIC PROCEEDINGS AND EFFECTIVE
ASSISTANCE OF COUNSEL WERE VIOLATED

Both the state and federal constitutions guarantee the accused the right to an open, public trial. See Presley v. Georgia, 558 U.S. 209, 213,

130 S. Ct. 721, 175 L. Ed. 2d 675 (2010); State v. Bone-Club, 128 Wn.2d 254, 261-62, 906 P.2d 325 (1995). In this state, Article 1, § 10, provides that “[j]ustice in all cases shall be administered openly,” and Article 1, § 20, that a defendant has a right to a “speedy public trial.” See State v. Love, 183 Wn.2d 598, 604-605, 354 P.3d 841 (2015), cert. denied, ___ U.S. ___, 136 S. Ct. 1524 (2016). These rights - and the mandate of having a criminal trial wholly public - “ensure a fair trial,” serve to “remind the prosecutor and judge of their responsibility to the accused and the importance of their functions,” encourage witnesses to come forward and “discourage perjury.” State v. Sublett, 176 Wn.2d 58, 73, 292 P.3d 715 (2012). In this case, those mandates were not followed, nor was GR 15, and further the improper restrictions placed on counsel violated Mr. Barnes’ fundamental rights to effective assistance of counsel under the Sixth and Fourteenth Amendments and Article 1, § 22.⁴

a. Relevant facts

Before trial, as part of the “[n]ormal course of business,” the state sent counsel a “stock form” protective order governing the forensic interview of T. 3RP 6. The state planned to use the interview against Barnes at trial. 3RP 6. Counsel objected, noting the exhibit was a recording of a normal forensic interview and questioning why it should be sealed. 3RP 7-8. He also pointed out it did not involve child pornography or anything similar. 3RP 7-8. Counsel objected that the county prosecutors were asking for protective orders in any case involving a minor child,

⁴Exhibit 12 has been designated to the Court as a sealed exhibit, subject to a motion to retain the seal pending this Court’s decision.

“regardless of the nature of the evidence.” 3RP 7-8. He also pointed to parts of the order which would unduly burden the defense. 3RP 8-9. The court did not rule. 3RP 9.

When the parties next appeared, in front of Judge Hickman, the prosecutor admitted that he was refusing to give counsel access to the evidence as part of discovery until the proposed order was signed. 4RP 4, 6-7. This was, he said, standard practice in his office, which had created its own “protocols [and] procedures” regarding evidence in such cases. 4RP 6-7. He argued the prosecutor’s office’s forensic interview should be sealed from public view and counsel should be limited from full access because the interview involved discussion of a child sex crime. 4RP 8. He also said that having it potentially released to the public if the defense did not keep it secure would be traumatizing to T and her mom but the order was only “mildly inconvenient” to the defense. 4RP 7-8. Ultimately, the prosecutor argued, not having the order “makes it more likely that the privacy rights of the child victim will be violated” by unauthorized use or release. 4RP 8-9.

Counsel objected not only to the order but the implication that defense attorneys were all incapable of handling discovery in a secure way. 4RP 10. He noted the constitutional presumption of open criminal proceedings and that the burden of justifying any limit was on the state. 4RP 10. He also argued that the limits on his use and possession of the evidence on his client’s behalf were an improper limit on Barnes’ right to counsel. 4RP 10. He disputed the state’s suggestion had to prove such harm to *prevent* closure. He also reminded the court that, at the time the

prosecutor's interviewer made the tape with the child, both T and her mom had known it was going to be taped and used against Barnes in any criminal trial. 4RP 10.

Judge Hickman declared “[a]bsolutely there’s cause for this protection order,” then went on:

We’re dealing with the privacy of a minor child. We live in a world now where anything and everything is available for the entire universe to be seen. **This child has a right to privacy and has a right not to have a sensitive, confidential - - well, it’s not confidential, but a sensitive interview about subjects that children don’t talk about on a daily basis and not have it subject to any person who can take that in violation of an order and post it on the Internet or provide it to any other person who has no relationship whatsoever to this case.**

4RP 12-13 (emphasis added). The specific parts of the order were then discussed, including counsel’s concern that the order required him not to keep a copy of the exhibit for his client’s further use, including personal restraint petitions, after which a slightly amended order was entered. 4RP 19, 21-24.⁵ It remains in force on its face. See App. B.

b. These rulings violated rules and rights

The trial court erred and violated CrR 4.7, GR 15, the constitutional mandates on open and public trial court proceedings and the right to counsel with these rulings. The operation of courts and conduct of trial proceedings are “matters of utmost public concern.” See Dreiling v. Jain, 151 Wn.2d 900, 910, 93 P.3d 861 (2004). A trial court being asked to decide whether to seal or close a part of a proceeding must start with the premise of “presumptively open criminal action[s] and disposition[s].”

⁵The language of the Amended Order is attached as Appendix B.

State v. Richardson, 177 Wn.2d 351, 360, 302 P.3d 156 (2013). This presumption helps ensure the “vital constitutional safeguard” of the open administration of justice.” In re Detention of D.F.F., 172 Wn.2d 37, 41, 256 P.3d 357 (2011).

Indeed, the mandate that criminal proceedings are presumptively completely open and public is so strong that our highest Court has said any exception “is appropriate only in the most unusual of circumstances.” Hundtofte v. Encarnacion, 181 Wn.2d 1, 330 P.3d 168 (2014). This Court applies de novo review, because it is a question of law. See State v. Wise, 176 Wn.2d 1, 5, 7, 288 P.3d 1113 (2012).

On such review, this Court should reverse. The trial court did not even comply with the relevant rule, let alone constitutional mandates, before sealing the evidence from public scrutiny and limiting access by the defense. As a threshold matter, the closure and limits in this case implicate the constitutional rights to open public trials even though the order was entered as part of discovery rulings pretrial. There are parts of trial generally not subject to the concerns of open public courts, including, in general, discovery. Dreiling, 151 Wn.2d at 909-10; Tacoma News, Inc. v. Cayce, 172 Wn.2d 58, 61, 256 P.3d 1179 (2011). Pretrial discovery often involves sharing of information which may not end up being relevant or used at trial, so the courts have found no right to “open, public courts” applies as a result. Dreiling, 151 Wn.2d at 910.

That holding retains no currency where, as here, discovery later becomes part of the decision-making process at trial. Dreiling, 151 Wn.2d at 910. Pretrial restrictions on such evidence *do* implicate the constitutional

mandates on open, public proceedings. Dreiling, 151 Wn.2d at 910. In such cases, the public must be presumptively given access to the “complete judicial proceeding” including all evidence and records considered in making a decision, even if not “dispositive.” See Rufer v. Abbott Labs, 154 Wn.2d 530, 549, 113 P.3d 1182 (2005). The policies underlying CrR 4.7 and due process require pretrial discovery to be “as full and free as possible consistent with the protections of persons, effective law enforcement, the adversary system, and national security.” State v. Yates, 111 Wn.2d 793, 797, 765 P.2d 291 (1988) (quotation omitted).

Thus, CrR 4.7(a) requires the prosecutor to “disclose to the defendant” any videos “which the prosecuting attorney intends to use” at trial, subject only to “protective orders or as to matters not subject to disclosure.” See State v. Boyd, 160 Wn.2d 424, 156 P.3d 54 (2007). The purpose of requiring such disclosure “is to protect the defendant’s interests in getting meaningful access to evidence supporting the criminal charges in order to effectively prepare for trial and provide adequate representation.” 160 Wn.2d at 432-33. It is “long settled policy in this state” to construct criminal discovery rules in order satisfy these purposes, as well as minimizing surprise, affording opportunity for effective cross-examination and meeting the requirements of due process. Yates, 111 Wn.2d at 797. And it is well-settled that a prosecutor “intends to use” evidence for purposes of the discovery rule where “there is a reasonable probability” it will be used “during any phase of the trial,” not just the state’s case in chief. See State v. Dunivin, 65 Wn. App. 728, 733, 829 P.2d 799, review denied, 120 Wn.2d 1016 (1992).

Here, Exhibit 12 was used as evidence against Mr. Barnes, played for the jury in open public court (but *not* transcribed) at trial. 8RP 696. Thus, although the lower court's ruling initially may have involved pretrial discovery, because that discovery involved evidence used to prove guilt in a criminal trial, the constitutional rights to free, open and public criminal court proceedings were involved. Dreiling, 151 Wn.2d at 910.

Taking the rule first, GR 15(c)(2) only authorizes the trial court to seal "if the court makes and enters written findings" that the proponent has shown an "identified compelling privacy or safety concerns that outweigh the public interest" in open courts. GR 15(c)(2)(A)-(F). No such written findings were made. See CP 213-14. In addition, although the rule only requires proof of a "compelling" interest, the constitution requires more. GR 15(c)(2); see Waldon, 148 Wn. App. at 966-67. Unless the interest in question is the defendant's right to a fair trial, the party seeking closure must show a "serious and imminent threat" to an "important interest." Bone-Club, 128 Wn.2d at 258. This requires proof of more than just a "compelling" concern; the proponent of the closure must make "a showing that is more specific, concrete, certain, and definite" than that. Waldon, 148 Wn. App. at 962-63. GR 15 also differs from constitutional mandates because the latter requires the proponent not just to give a reason for the closure but "reasonable specificity" as to the feared harm, with only the "least restrictive means" of remedy. Waldon, 148 Wn. App. at 963.

The order here contains no balancing or findings that the extremely strong presumption of open court proceedings was outweighed. CP 213-14. Further, the court below utterly failed to consider the required

framework for both GR 15 and the fundamental constitutional rights involved. A court examining a request to seal must analyze the request in light of a five-step framework described in Seattle Times Co. v. Ishikawa, 97 Wn.2d 30, 37-39, 640 P.2d 716 (1982) (also sometimes called the Bone-Club test); see Waldon, 148 Wn. App. at 967. Under Ishikawa, the party seeking to seal the court records must 1) make “some showing of the need therefor,” 2) allow those present to object, 3) show that the request is “the least restrictive means available” and will be “effective in protecting the interests threatened,” 4) show that the competing interests of the party seeking closure outweigh the strong interests of the public, including that alternatives short of sealing would be insufficient to protect those interests and 5) the order must be “no broader than necessary to protect the interest.” Ishikawa, 97 Wn.2d at 37-39.

These mandates were utterly abandoned by Judge Hickman below. He did not apply a presumption of open proceedings. 4RP 12-14. He did not go through the factors and conclude that the complete closure of a trial exhibit from public view was necessary, or that it was the least restrictive means available and would be “effective” in protecting the interests at risk. 4RP 12-14. He did not explain why the standard forensic interview of a child by a prosecutor’s employee was so sensitive and so in need of protection from public view that interests of the child’s “privacy” overshadows the public trial mandates. 4RP 12-14. He did not explain why an exhibit depicting an interview rather than child pornography or something similar was in need of exclusion from public view, despite the strong presumption in this state of open, public justice. 4RP 12-14. Nor

were there findings that this particular counsel was incapable of handling evidence with due care. 4RP 12-14.

Nor did the court require the prosecution to “to establish, not merely claim or allege, the need for appropriate restrictions.” 4RP 12-14. The state’s reasoning was that in *every case*, every interview of a child which mentioned sensitive matter should always be presumptively sealed from the public, with access always limited for the defense. 4RP 7-8. The trial court also seemed convinced that such a blanket order in every similar case would be proper. In issuing the order, Judge Hickman expressed his belief that it was proper to automatically exclude the public from and limit defense access to any material which might affect a child witness’ privacy at some point in the future. 4RP 12-13. He was concerned the “sensitive interview about subjects that children don’t talk about on a daily basis” might somehow get posted online by someone “who has no relationship whatsoever to this case.” 4RP 12-13.

But the requirements of GR 15 and, more importantly, the constitutional rights of the public and the accused to open, public criminal proceedings are not automatically erased simply because the crime is heinous and the victim a child. See Allied Daily Newspapers of Wa. v. Eikenberry, 121 Wn.2d 205, 848 P.2d 1258 (1993); Boyd, 160 Wn.2d at 431. They apply to documents containing extremely sensitive information about expert evaluation of parents whose rights to their children are being terminated, so that it is a violation of Article 1, § 20 and GR 15 when the family courts were sealing such documents ex parte. State v. Parvin, 184 Wn.2d 741, 364 P.3d 94 (2015).

Even with a Legislative finding of the potential harm and the strong concern of protecting a child “from further trauma and harm” in child abuse cases, automatic sealing or limitation on public openness is not allowed. Allied, 121 Wn.2d at 209-210 (striking down statute requiring courts to use initials in certain cases for privacy of children). Instead, the decision must be made on an “individualized basis” and “any closure of traditionally open judicial proceedings is permissible” under Article 1, § 10 only if such closure is found “necessary,” after applying constitutional “guidelines.” 121 Wn.2d at 214.

Put another way, a trial court may not just create a “blanket exemption” from the rules in a particular type of case. See In re the Dependency of M.H.P., 184 Wn.2d 741, 364 P.3d 94 (2015). It must go through the relevant factors, on the record, for its decision to be upheld. Bone-Club, 128 Wn.2d at 259-60. And it must do so *prior* to the closure or sealing, because a failure to properly conduct the analysis cannot be cured by a post hac determination by this Court that the required factors would have been met. 128 Wn.2d at 256-57.

In addition, this was not just an order to “seal.” By definition, “sealing” involves only prohibiting “the public’s right of access to the files.” State v. Noel, 101 Wn. App. 623, 628, 5 P.3d 747 (2000). Here, the Order also limited use of the exhibit by *the defense*. CP 213-14; see App. ___. And this is not the first time this same prosecutor’s office has refused to give the defense evidence it plans to use at trial, using similar claims. See Boyd, supra; see also, State v. Grenning, 169 Wn.2d 47, 234 P.3d 169 (2010).

In Boyd, the Pierce County Prosecutor’s Office also refused to give the defense attorney evidence without restriction, even though it intended to use that evidence at trial. 160 Wn.2d at 432. That office argued that an order similar to the one entered here was needed in order to “limit[] the risk of victimization through further dissemination of the sexual crimes depicted in the evidence.” Id. Even with such presumptively illegal material as child pornography, the spread of which would further victimize the child, the Court rejected the idea that the trial court could limit defense access to the materials in significant ways. 160 Wn.2d at 434-35. Instead, our state’s highest Court found that due process and the right to a fair trial require effective assistance and access to evidence, as do the Sixth and Fifth Amendments. 160 Wn.2d at 434-35.

Notably, in reaching its conclusion in Boyd, the Court specifically rejected the same theory presented below - that an increased “risk of annoyance or embarrassment to the victims” justified limiting defense access. 160 Wn.2d at 440. Even though the evidence in question was child pornography in which the victim was shown being abused, the Court noted, having that material public “is an attendant consequence of trial.” 160 Wn.2d at 440; see also, Allied, 121 Wn.2d at 214. Almost by definition, a trial accusing someone of possession of child pornography would involve public display of that pornography and testimony about it in open court at trial. Boyd, 160 Wn.2d at 440. Giving defense counsel access to the evidence did not, therefore, “create a risk where there was none,” despite the state’s claims. Id.

The Boyd Court concluded that the defense “right to adequate

representation” included the right to “meaningful access” to evidence, without having to establish that “effective representation merits a copy” of the evidence being used to prove guilt. 160 Wn.2d at 433. And in Grenning, again, the Pierce County Prosecutor’s Office denied counsel access to all of the evidence, as in Boyd, child pornography. Grenning, 169 Wn.2d at 55. Again, the Supreme Court rejected the idea that the defense should be limited in access to the evidence against the accused, in every case.

Boyd and Grenning both involved far more challenging and sensitive evidence, against the spread of which the public interest is extreme (child pornography). But just as in those cases, here, the same prosecutor’s office again decided to craft a “protective” order preventing the public from constitutionally guaranteed access to proceedings in a criminal trial - and further, to deprive counsel of full access to evidence. In Grenning, our state’s highest Court again rejected the claims raised by the prosecution below here and in Boyd, that the defense team “might disseminate the images,” thus creating a “risk.” 169 Wn.2d at 54. Not only that, in Grenning, Boyd and this case, the state made only “mere allegations” of the *possibility* of such a risk. But the Supreme Court concluded in Grenning and Boyd that there is “minimal risk” of such improper dissemination, because defense counsel are officers of the court. Grenning, 169 Wn.2d at 54-55. That was several years before the same prosecutor’s office in both Grenning and Boyd would make the very same argument implying a “risk” from defense counsel, here.

Reversal is required. Because the state failed to produce the

material it was required to produce under the rules of discovery, this Court must reverse unless the other evidence in the case is so overwhelming that no rational trier of fact would have failed to convict even without the evidence not fully released. Grenning, 169 Wn.2d at 61. That standard is not met. The crime of child rape requires proof of penetration. RCW 9A.44.073. The forensic interview is where the evidence of penetration was derived, from the “boomerang” comments. Without that DVD, it is impossible to say that every single trier of fact considering the evidence would have found guilt. The order was issued in violation of GR 15 and Article 1, §§ 10 and 22, and the right to open courts. Further, because the improperly issued order limited counsel’s free access to the evidence against Mr. Barnes without adequate justification, it offended the rights to effective assistance of appointed counsel. This Court should so hold.

4. THIS COURT SHOULD ADDRESS THE VIOLATIONS OF CRIMINAL RULE 3.2, ARTICLE 1, § 20 AND EIGHTH AMENDMENT PROHIBITIONS

This Court should also hold that Mr. Barnes was deprived of his CrR 3.2, Article 1, § 20, due process, equal protection and Eighth Amendment rights by the release and bail decisions below.

a. Relevant facts

Mr. Barnes was arrested on December 1, 2014. See CP 3-4. At the hearing the next day, the prosecutor discussed bail:

[N]o contact with victim or minors. Individual’s criminal history includes old case an Assault IV, Theft III, Burglary II, all 2003. Alleged victim here, underage individual. State seeks 100,000 bail, no contact victim or minors. Thank you.

1RP 4. Barnes asked for release on personal recognizance, arguing that it

was “the presumption” under CrR 3.2. 1RP 4-9. He noted that, under the rule, the judge could deny such release only upon a finding of “a risk of flight” or a “likely danger he would either commit a violent crime or seek to intimidate witnesses or otherwise interfere.” 1RP 7. As the state had not presented such evidence or argument, he said, the court was required to apply the presumption. 1RP 7-8.

Counsel also pointed to facts which showed Barnes was neither a flight risk nor a “likely danger” as those terms were defined. 1RP 8. He had lived in the area his whole 32 years. 1RP 8. His entire family was in the area or state. 1RP 4-5. He had lived in the same rental home for 10 years, was employed in the same job he had held for over five years and had been with the same girlfriend for 10 years. 1RP 4-5. His children were here, with her. 1RP 4-5. He had never failed to appear, had one prior case more than ten years before, had no juvenile criminal history and did not try to flee after being accused, before arrest. 1RP 5-7. Regarding the “danger” exception, counsel pointed out there were no claims of threat or intimidation, of any kind. 1RP 5-6. Put simply, counsel said, Barnes was “not a risk of flight,” “not a risk of danger,” and “not likely to commit another violent crime.” 1RP 6.

Counsel was candid that finances were a big concern if Barnes was not released. 1RP 5. His family needed both his income and that of his girlfriend, Smith, to get by. 1RP 5. Barnes was going to lose his job, however, “[i]f he misses any significant amount of time from work.” 1RP 5. Ultimately, counsel suggested that the court could address any concerns with a “no contact” order; Barnes had already arranged to live with

someone with no kids, if the court so desired. 1RP 9.

Without further discussion and without finding likelihood of either fleeing or danger, Judge Nevin said, “I’m going to set bail.” 1RP 9.

Next, the amount was discussed. 1RP 9. Counsel asked the court to set an amount which Barnes could possibly meet, so he could keep his job. 1RP 9. He gave further details about the financial concerns, including that Barnes and his family were renters and lived “month-to-month.” 1RP 9. Counsel asked for bail at \$10,000, although he was not sure Barnes could meet that. 1RP 9. Again without elaboration, Judge Nevin ruled, declaring, “I’m going to set bail in the amount of \$100,000.” 1RP 9.

Preprinted on the written CrR 3.2 Order was the following: “THE COURT HAVING found probable cause, establishes the following conditions,” with a release condition of “execution of a surety bond in the amount of \$100,000 or posting cash in the amount of \$100,000.00.” CP 188-89.

16 days later, on December 19th, Barnes was again before the court seeking release on personal recognizance, arguing the presumption of CrR 3.2. 2RP 4. This time in front of Judge Hickman, counsel urged the court to “to follow the court rules and to follow the Constitution[.]” 2RP 5. When the judge asked about community “ties,” counsel again detailed them. 2RP 6. He also told the court about the arrangements Barnes had made to live apart from his kids if the court had any concerns. 2RP 6.

Again, counsel detailed the financial impact and hardship pretrial detention was causing for Barnes’ family and their ability to make ends meet. 2RP 6-7. Mr. Barnes had worked his way up to a supervisor position

at his job, and while his employer had thus far arranged not to fire him, he could not do so much longer. 2RP 7-8. Barnes' young family needed his income because their bills for the month were about \$2,000 including rent and utilities, so both his income and that of Smith were required. 2RP 7.

Counsel also addressed the desires of Vaeote and others to "punish" Barnes by keeping him in custody pretrial, noting that Barnes had not yet been convicted and such "punishment" was inappropriate. 2RP 8-9, 14. Because there was no evidence Barnes would fail to appear at any future proceeding or of any real "danger" if he was released, counsel urged the court to amend Judge Nevin's order and release Barnes on personal recognizance. 2RP 10. In the alternative, counsel asked the court to reduce the bail amount to something Barnes could afford to pay, around \$10,000 or \$20,000. 2RP 10.

The prosecutor objected, actually urging an increase in bail to \$150,000, because a gun had been found in a car to which Barnes had access. 2RP 13. The prosecutor also said Barnes "has access to at least three kids that we know of," apparently referring to Barnes' children. 2RP 13. Counsel objected that there was no evidence of anything untoward with those kids, also stating a "no contact" order could be imposed. 2RP 14. But he argued that the court could not impose bail unless it made "a finding that less restrictive alternatives would not work." 2RP 14.

Judge Hickman reduced the bail to \$50,000, saying any later weapons charge added might cause the court to "reassess." 2RP 15-16. A "bail receipt" later filed indicated that Mr. Barnes got a bond through "Aladdin Bail Bonds" in that amount that day. CP 210-12.

b. Denial of presumptive release and setting excessive bail

Pretrial, the accused are cloaked with the presumption of innocence. State ex rel Wallen v. Judges Noe, Towne, Johnson, 78 Wn.2d 484, 487, 475 P.2d 787 (1970); Coffin v. United States, 156 U.S. 432, 453, 15 S. Ct. 394, 39 L. Ed 481 (1895). The presumption is so fundamental that it is “implicit in the concept of ordered liberty.” Winship, 397 U.S. at 364. In our society, “liberty is the norm,” so “detention prior to trial or without trial is the carefully limited exception.” United States v. Salerno, 481 U.S. 739, 742, 107 S. Ct. 2095, 96 L. Ed. 2d 697 (1987); see State v. Barton, 181 Wn.2d 148, 331 P.3d 50 (2014).

The Eighth Amendment does not guarantee a right to release on bail, but prohibits bail which is “excessive.” Salerno, 481 U.S. at 754. In Washington, our state’s Article 1, § 20, provides a right to bail in all but the most extreme case. State v. Heslin, 63 Wn.2d 957, 959-60, 389 P.3d 892 (1964); Barton, 181 Wn.2d at 152-53.⁶ Only when the case is “capital” or involves a potential sentence of life in prison may a judge deny release on bail. Barton, 181 Wn.2d at 152-53. Further, to prove that such denial is proper, there must be “a showing by clear and convincing evidence of a propensity for violence that carries a substantial likelihood of danger to the community or any persons.” Art. 1, § 20. Otherwise, there is a constitutional right to bail “by sufficient sureties.”

In addition, CrR 3.2 provides for a presumption of release, without

⁶Prior to 2010, a trial court had no authority to deny bail for anything other than a capital case. See ESHJ Res. 4220, 61st Leg., Reg. Sess (Wash. 2010); Barton, 181 Wn.2d at 152-53. The 2010 Amendments added the authority to deny bail in cases involving life in prison.

conditions, in any non-capital case. As applicable here, former CrR 3.2 (2014) provided, in relevant part:

- (a) **Presumption of Release in Noncapital Cases.** Any person, other than a person charged with a capital offense, shall at the preliminary appearance or reappearance. . . be ordered released on the accused's personal recognizance pending trial unless
 - (1) the court determines that such recognizance will not reasonably assure the accused's appearance, when required, or
 - (2) there is shown a likely danger that the accused:
 - (a) will commit a violent crime, or
 - (b) will seek to intimidate witnesses, or otherwise unlawfully interfere with the administration of justice.

Neither judge applied the former CrR 3.2(a)(2014) presumption of release on personal recognizance as required in this case. "Personal recognizance" release is "[t]he release of a defendant in a criminal case in which the court takes the defendant's word he or she will appear for a scheduled matter." BLACKS LAW DICTIONARY (10th ed. 2014). It involves no conditions. But here, both judges appear to have assumed that financial and other conditions were proper, rather than presuming they were *not*. See 1RP 9; 2RP 15-16.

In addition, neither judge made any of the findings that were required under the rule before the presumption could be overcome. Neither cited anything showing that Barnes was not likely to appear without conditions. See 1RP 9; 2RP 15-16. Nor did either find Barnes was likely to "unlawfully interfere with the administration of justice" or intimidate a

witness. 1RP 9, 2RP 15-16. Indeed, not even a “boilerplate” finding on either of these factors was made. See CP 188-9, 208-209.

Yet the language of the rule is plain. The presumption applies *unless* the trial court makes the required findings. See CrR 3.2 (2014). Further, counsel specifically, repeatedly argued this point and the relevant standards and facts at length. See 1RP 1-10,⁷ 2RP 1-14.⁸ Notably, those facts would not have supported a finding that the presumption was overcome. Barnes had no juvenile criminal history and one adult offense more than ten years before. 1RP 1-9; 2RP 1-10. He had lived in the county his entire life, in the same rental for 10 years. He had been at his job for five years, working his way up to a position of authority he now enjoyed. Id. His girlfriend and their young children were here, as was his entire extended family. Barnes had no prior FTAs and had not fled when he knew he was accused in this case. Further, there was no evidence he had ever intimidated a witness or had any history of the type of behavior which would show a risk of “substantial danger.” See 1RP 1-10; 2RP 1-14.

In response, the prosecution may urge the Court to decline to discuss the issue as “moot.” There is no question Barnes ultimately made bail, once it was reduced. But the initial denial by both courts of the

⁷For determining whether there is a risk of future non-appearance, the court considers factors including history of appearances, employment status, ties to the community, length of residence, criminal record, willingness of responsible parties to vouch for and assist and the nature of the charge “if relevant to the risk of non-appearance. Former CrR 3.2(b)(2014).

⁸For the “showing of substantial danger,” the relevant factors include criminal record, willingness of a responsible community member to vouch for and assist, the reputation, character and mental condition of the accused, past record of committing offenses on pretrial release, any evidence of threats or intimidation of witnesses and record of use or threats of use of weapons, especially to victims or witnesses. Former CrR 3.2 (c)(2014).

presumption of release on personal recognizance is an issue of continuing and substantial interest, likely to arise again but evade review. See, e.g., Federated Publ'ns, Inc. v. Swedberg, 96 Wn.2d 13, 16, 633 P.2d 74 (1981), cert. denied, 456 U.S. 984 (1982).

It should not escape notice that two judicial officers in Pierce county failed to apply the plain presumption of CrR 3.2 in this case. In addition, pretrial detention has a significant negative impact on the accused, who is “warehoused” despite not having been convicted of the crime:

The time spent in jail awaiting trial has a detrimental impact on the individual. It often means loss of a job; it disrupts family life; and it enforces idleness. Most jails offer little or no recreational or rehabilitative programs. The time spent in jail is simply dead time.

Barker v. Wingo, 407 U.S. 514, 532-33, 33 L. Ed. 2d 101, 92 S. Ct. 2182 (1972). There is also strong evidence that pretrial detention correlates to increased likelihood of conviction and higher sentence. *See* Andrew D. Leipold, *How the Pretrial Process Contributes to Wrongful Convictions*, 42 AM. CRIM. L. REV. 1123, 1165 (2005); Christopher T. Lowenkamp et. al, *Investigating the Impact of Pretrial Detention on Sentencing Outcomes*, Arnold Foundation (Nov. 2013).⁹ There can be no question that a person still cloaked with the presumption of innocence suffers significant negative impact on their lives - and their case - when deprived of the presumption of release on personal recognizance as Barnes was here under former CrR 3.2 (2014).

In addition, as this case makes plain, that impact falls hardest on the

⁹Available at <https://csgjusticecenter.org/courts/publications/investigating-the-impact-of-pretrial-detention-on-sentencing-outcomes/>

poor. And further, it led to the violation of the Eighth Amendment, Article 1, § 20, and equal protection. The Eighth Amendment prohibition on “excessive bail” is violated when bail is set “at a figure higher than an amount reasonably calculated” to ensure the presence of the accused in court. Stack v. Boyle, 342 U.S. 1, 4, 72 S. Ct. 1, 96 L. Ed. 3 (1951). The function of bail is “limited” so that fixing of it for “any individual defendant must be based upon standards relevant to the purpose of assuring the presence of that defendant.” Id. Further, bail “is not a device for keeping persons in jail upon mere accusation until it is found convenient to give them a trial;” instead it is intended “to enable them to stay out of jail until a trial has found them guilty.” Boyle, 342 U.S. at 7-8 (Jackson, J, and Frankfurter, J, concurring).

Here, neither judge discussed what monetary amount of bail was required in light of the specific situation of Mr. Barnes and this case. 1RP 7-9, 2RP 12-14. This failure to adjust bail to fit the individual case ends up creating not only a violation of excessive bail but a problem of equal protection, as impoverished suspects are kept in jail pending trial while those with money are not. Having a separate “second class” system of accused kept in custody based on inability to post monetary bail has been discussed with concern for years. See, John S. Goldkamp, *Two Classes of the Accused: A Study of Bail and Detention in American Justice* (Ballinger Publishing Co., 1979) (Cambridge, Ma). But more recently, at roughly the same time as the rise of the private bail bonds industry, the number of those held in jail pending trial increased dramatically, as did the length of average

detention (from 14 to 23 days).¹⁰ See Ram Subramanian et al, *Incarceration's Front Door: The Misuse of Jails in America*, Vera Institute of Justice (Feb. 2015).¹¹ Further, from 1990 to 1998, “non-financial” release in state courts dropped from 40% of all those released to 28%. See Thomas H. Cohen and Brian A. Reaves, Bureau of Justice Statistics, Special Report, *Pretrial Release of Felony Defendants in State Courts* (Nov. 2007).¹²

Today, it is estimated that, like Mr. Barnes, three out of five people sitting in jail in our country are legally presumed innocent, awaiting trial or plea resolution, too poor to afford bail. See Timothy R. Schnacke, *Fundamentals of Bail: a Resource Guide for Pretrial Practitioners and a Framework for American Pretrial Reform*, U.S. Dept. Of Justice, Nat'l Inst. of Corrections (2014).¹³ And this is not without societal cost. Indeed, in 2015, then-U.S. Attorney General Eric Holder acknowledged that the pretrial detention of the accused was costing an estimated 9 billion taxpayer dollars - even though the majority of those in jail were there simply for lack of money to post bail. Eric Holder, Attorney General of the United States, Speech at the National Symposium on Pretrial Justice (June 1,

¹⁰Pierce County's average wait time for trial is far longer, and more than average for the state. See Caseloads of the Courts, 2016 Annual Report, available at, www.courts.wa.gov/caseload/fa=caseload.showReport&level=s&freq=a&tab=trend&fileID=Crimcm

¹¹Available at <http://vera.org/pubs/incarcerations-front-door-misuse-jails-america>

¹²Available at <https://www.bjs.gov/content/pub/pdf/prfdsc.pdf>.

¹³Available at <http://www.pretrial.org/download/research/Fundamentals%20of%20Bail%20-%20NIC%202014.pdf>

2011)).¹⁴

Applying the presumption of release on personal recognizance properly would help quell this serious issue in our criminal justice system. By failing to apply that presumption and instead setting high financial conditions of release, Judge Nevin effectively worked an invidious discrimination, keeping Mr. Barnes in custody because he was too poor to pay the \$100,000 required, in violation of the equal protection clause. See, e.g., Tate v. Short, 401 U.S. 395, 28 L. Ed. 130, 91 S. Ct. 668 (1971); Williams v. Illinois, 399 U.S. 235, 26 L. Ed. 2d 586, 90 S. Ct. 2018 (1970). This Court should condemn the lower court judges' failures to follow the plain language of former CrR 3.2 (2014), which have resulted in a deprivation of equal protection for the impoverished accused. It should further hold the decision imposing \$100,000 financial bond was in violation of the Eighth Amendment prohibition on excessive bail.

5. CONDITIONS 16, 24, 28 AND 29 ARE UNAUTHORIZED AND UNCONSTITUTIONAL

Under the Sentencing Reform Act, the trial court's authority to impose a sentencing condition is wholly statutory. State v. Zimmer, 146 Wn. App. 405, 414, 190 P.2d 121 (2008), review denied, 165 Wn.2d 1035 (2009). The sentencing court is thus limited to imposing only those conditions which the Legislature has set forth in law. State v. Hale, 94 Wn. App. 46, 53, 971 P.3d 88 (1988). A condition which exceeds that authority must be stricken. State v. O O'Cain, 144 Wn. App. 772, 775, 184 P.3d

¹⁴Available at <http://www.justice.gov/opa/speech/attorney-general-eric-holder-speaks-national-symposium-pretrial-justice>.

1262 (2008). Further, if a condition impacts a fundamental constitutional right, it is subject to heightened review. See State v. Bahl, 164 Wn.2d 739, 744-46, 193 P.3d 678 (2008).

In this case, conditions 16, 24, 28 and 29 were not statutorily authorized and do not withstand heightened review. At the outset, the conditions are properly before the Court. An illegal or erroneous condition may be challenged for the first time on appeal. Bahl, 164 Wn.2d at 74-45. Further, where, as here, the challenges are to the trial court's statutory authority to impose the conditions or their unconstitutionality as written, they are properly addressed on direct review. Id.; see State v. Jones, 118 Wn. App. 199, 204, 76 P.3d 258 (2003).

On such review, this Court should strike conditions 16, 24, 28 and 29, which are not authorized by statute and run afoul of fundamental constitutional rights. Those conditions provide:

16. Do not enter into any location where alcohol is the primary product, such as taverns, bars, and/or liquor stores. . . .
24. Do not go to or frequent places where children congregate, (I.E. Fast-food outlets, libraries, theaters, shopping malls, play grounds and parks, etc.) unless otherwise approved by the Court. . . .
28. You shall not have access to the Internet except for educational or employment purposes at any location in any medium to include cellphones, nor shall you have access to, possess or peruse any sexually explicit materials in any medium. Your sexual deviancy treatment provider will define sexually explicit material. You are also prohibited from joining or perusing any public social websites (Face book, Myspace, Craigslist, etc.), Skyping, or telephoning any sexually-oriented 900 numbers. . . .
29. Do not patronize prostitutes or any businesses that

promote the commercialization of sex; also, do not go to or loiter at any place where sexually explicit materials are sold.

CP 172-73.

None of these conditions was authorized by statute. Former RCW 9.94A.703 (2009), applicable here, provides for both mandatory and “waiveable” or “discretionary” conditions, which include ordering a person to refrain from consuming alcohol, participate in “crime-related” treatment or perform other “affirmative conduct reasonably related to the circumstances of the offense, the offender’s risk of reoffending, or the safety of the community.” Former RCW 9.94A.703 (2009). Conditions 16, 24, 28 or 29, are not listed. Former RCW 9.94A.703 (2009). And further none of them were “affirmative conduct reasonably related to the circumstances of the offense” or reoffending or safety under former RCW 9.94A.703 (2009).

Former RCW 9.94A.505(7) (2009) also allowed imposition of crime-related prohibitions. - which means it must be directly relating to the circumstances of the crime. See In re the Personal Restraint of Rainey, 168 Wn.2d 367, 375, 229 P.3d 686 (2010); RCW 9.94A.030(10). While there need not be a *causal* link, there must at least be sufficient evidence showing a factual relationship between the crime being punished and the condition being imposed. State v. Parramore, 53 Wn. App. 527, 531, 768 P.2d 530 (1989).

But conditions 16, 24, 28 and 29 were not “crime-related” or “reasonably related” to the circumstances of the offense. The incident did not occur in a “location where alcohol is the primary product, such as a

tavern” (16), or a public place “where children congregate” such as “libraries” and shopping malls (24). Nor were the internet, cellphones, sexually explicit materials, public social websites, “sexually-oriented” “900 numbers” (28), prostitutes, businesses “that promote the commercialization of sex” or a place “where sexually explicit materials are sold” (29). The alleged crime was inside a private home. No electronic devices, visual materials, internet access, social media or anything similar were involved.

Further, save for the prohibition on illegal activity (“prostitutes”), the conditions are both unconstitutionally vague and in violation of fundamental due process and First Amendment rights. Unlike with statutes, there is no presumption of constitutionality for community custody conditions. See State v. Sanchez Valencia, 169 Wn.2d 782, 792-93, 239 P.3d 1059 (2010).¹⁵ State and federal due process requires the state to give fair notice and warning of what conduct a person on community custody must avoid. Bahl, 164 Wn.2d at 752.

As a result, a condition must 1) provide sufficient notice and 2) include sufficient standards to protect against arbitrary enforcement. Id.; see State v. Sansone, 127 Wn. App. 630, 638, 111 P.3d 1251 (2005). While an exacting standard of certainty is not required, a condition must be sufficiently specific to provide an ordinary person the ability to “understand what conduct is proscribed.” Sanchez Valencia, 169 Wn.2d at 785. But these conditions fall short. Now that alcohol is in virtually every grocery

¹⁵This holding of Sanchez Valencia abrogated our state’s prior rule. Compare, State v. Riles, 135 Wn.2d 326, 349, 957 P.2d 655 (1998), overruled by Sanchez Valencia, 169 Wn.2d at 792-93.

store and gas station, what is a location where the “primary product” is alcohol? What is a “sexually-oriented” number? What is a place “where sexually explicit materials are sold?” Does that include grocery stores which have Playboy? Where do “children congregate?”

And what is a business that “promote[s] the commercialization of sex?” Some define “commercialization of sex” as occurring with “offering or receiving any form of sexual conduct in exchange for money” - which might be limited to just places offering prostitution, which is already illegal. See e.g., Christopher R. Murray, *Grappling with ‘Solicitation:’ The Need for Statutory Reform in North Carolina after Lawrence v. Texas*, 14 DUKE J. GENDER L. & POLICY 681, 682 (2007). Others define it as any use of media involving sexuality “to sell products and attract consumer interest.” See e.g., Takiyah Rayshawn McClain, *An Ounce of Prevention: Improving the Preventative Measures of the Trafficking Victims Protection Act*, 40 VAND. J. TRANSNAT’L L. 587, 603 (2007). And conditions of community custody about avoiding children do not even require that the defendant know that a place is one where “minors congregate” or willfully go to such a place - attending a food bank near a school can result in reimprisonment. State v. McCormick, 166 Wn.2d 689, 213 P.3d 32 (2009).

In addition, a person convicted of a crime is not divested of all First Amendment rights. See Bahl, 164 Wn.2d at 756-57. A restriction on such a fundamental constitutional right is only proper if “reasonably necessary to accomplish essential needs of the state and public order.” Bahl, 164 Wn.2d at 757-58; see In re Personal Restraint of Waggy, 111 Wn. App. 511, 517, 45 P.3d 1103 (2002).

Adult pornography and communication is protected speech. See Reno v. ACLU, 521 U.S. 844, 117 S. Ct. 2329, 138 L. Ed. 2 874 (1997). The First Amendment also protects the forum aspect of the internet, such as social websites and tools for communication such as Craigslist and “Skype.” See id; Bahl, 164 Wn.2d at 757. Absent proof that such speech was involved in any way in the crime, and without any proof that the restrictions were “reasonably necessary to accomplish the essential needs of the state and public order,” the conditions must be stricken.

E. CONCLUSION

For the reasons stated herein, Mr. Barnes should be granted relief.

DATED this 20th day of July, 2017.

Respectfully submitted,

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CERTIFICATE OF SERVICE BY EFILING/MAIL

Under penalty of perjury under the laws of the State of Washington, I hereby declare that I sent a true and correct copy of the attached Opening Brief to opposing counsel VIA this Court's upload service, at pcpatcecf@co.pierce.wa.us, and by depositing a true and correct copy into first-class mail, postage prepaid, to Mr. Barnes, DOC 853558, Airway Heights CC, P.O. Box 2049, Airway Heights, WA. 99001-2049.

DATED this 20th day of July, 2017,

/S/Kathryn A. Russell Selk
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1037 Northeast 65th St., Box 176
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APPENDIX A

The verbatim report of proceedings consists of multiple separately paginated volumes, which will be referred to as follows:

December 2, 2014, as "1RP;"
December 19, 2014, as "2RP;"
January 16, 2015, as "3RP;"
February 6, 2015, as "4RP;"
September 11, 2015, as "5RP;"
October 9, 2015, as "6RP;"
February 19, 2016, as "7RP;"

the volumes containing the chronologically paginated proceedings of the pretrial, trial and sentencing on March 10, 14-17, 21-23, and May 20, 2016, as "8RP;"

the two chronologically paginated volumes containing the voir dire of March 15 and 16, as "9RP."

APPENDIX B (Protective Order).

As amended, the protective Order the trial court signed provided in relevant part as follows:

1. The evidence shall not be used for any purpose other than to prepare for the prosecution and/or defense of the named defendant in the above-entitled cause.
2. The evidence shall not be given, loaned, sold, or shown or in any other way provided to any member or associate of the media unless expressly permitted by court order.
3. The evidence shall not be exhibited, shown, displayed, or used in any fashion except in connection with judicial proceedings in the above-entitled cause. This provision is not meant to prohibit the defense or prosecution from exhibiting the evidence to any person(s) necessary to the preparation and/or presentation of the prosecution or defense case.
4. The evidence shall not be duplicated, except as required in connection with the prosecution or defense of the above-entitled cause, provided that any such duplication shall only be pursuant to a court order, each resulting copy shall be governed by this Order as if an original, except for an expert witness designated by Defense who shall be bound by the terms of this order.
5. Other than an original of the evidence maintained by the law enforcement or interviewing agency, any additional copies shall not be provided to anyone not employed by either the Pierce County Prosecuting Attorney's Office or counsel for the defendant with the exception of defense or prosecution experts.
6. The defendant shall not, under any circumstances, be permitted to retain or possess the DVD and/or audio tape and is only permitted to review the DVD/tape in the presence of defense counsel, a defense investigator, or a defense expert. The defense shall not be permitted to review the DVD and/or audio tape alone.

7. The DVD and/or audio tape shall be maintained by defense counsel and the prosecution in a secure location.
8. A transcript of the recording may be prepared at the expense of the party seeking transcription, provided that before either party provides the evidence to a transcriber or transcriptionist, the party shall serve that person with a copy of this Order. Proof of service of this order shall be retained in the prosecution or defense attorney's file until such a time as the evidence is returned to the Pierce County Prosecuting Attorney's Office or destroyed in accordance with this Order. A copy of the transcript shall be given to opposing counsel. If a copy is ordered by the date for trial then the state shall pay for cost of duplication.
9. Neither the transcript of the recording, nor any portion thereof, shall be divulged to any person not authorized by the terms of this stipulation to review the DVD and/or audio recording.
10. Before either party provides the evidence to an expert witness, the party shall serve the expert with a copy of this Order. Proof of service of this Order shall be retained in the prosecution or defense attorney's file until such a time as the evidence is returned to the Pierce County Prosecuting Attorney's Office.
11. When a final disposition in the above-entitled cause has been reached in the trial court, other than the evidence retained by the investigating law enforcement agency, any and all additional copies shall be returned to the Pierce County Prosecuting Attorney's Office within 30 days following final disposition in the trial court, unless otherwise agreed to by the parties and approved by the court. The Pierce County Prosecuting Attorney's Office will maintain one copy of the evidence for the pendency of the case, including appeals. Provided however that defense may retain a copy that may be necessary for [the] appellate process.
12. Either party may petition the court for access to the evidence at a later date upon a showing that the access is for a legitimate purpose in connection with the above-entitled cause. A legitimate purpose in connection with the above-entitled cause. A legitimate purpose shall include, but is not limited to

investigation and preparation of any legal action for the benefit of the defendant.

13. A copy of this Order shall be kept with the DVD and/or audio tape at all times.
14. Any violation of this Order by any party may be the subject of personal or professional sanction by the court.

RUSSELL SELK LAW OFFICE

July 20, 2017 - 1:44 AM

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