

No. 49357-8-II
Clark County No. 14-1-01325-6

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

STATE OF WASHINGTON,

Respondent,

v.

PAUL LUKE TETERS,

Appellant.

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

The Honorable Daniel Stahnke, Trial Judge

APPELLANT'S OPENING BRIEF
AMENDED

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A. ASSIGNMENTS OF ERROR

1. The trial court erred in allowing the prosecution to increase the charges against appellant mid-trial.
2. The convictions for both child molestation and attempted child rape violated the Article 1, § 9, and Fifth Amendment prohibitions against double jeopardy.
3. The prosecutor committed flagrant, prejudicial and ill-intentioned misconduct which could not have been cured by an instruction.
4. Appellant Paul Teters was deprived of his Article 1, § 22, and Sixth Amendment rights to effective assistance.
5. Teters was deprived of his state and federal rights to present a defense and to meaningful confrontation and cross-examination.
6. The trial court abused its discretion in refusing to disclose medical records after in camera review.
7. Mr. Teters assigns error to the following conditions of sentence, contained in Appendix A:
 3. You shall not enter into or frequent business establishments or locations that cater to minor children or locations where minors are known to congregate without prior approval of DOC. Such establishments may include but are not limited to video game parlors, parks, pools, skating rinks, school grounds, malls or any areas routinely used by minors as areas of play/recreation.
 6. You shall submit to urine, breath, PBT/BAC, or other monitoring whenever requested to do so by your community corrections officer to monitor compliance with abstention from alcohol and non-prescribed controlled substances.
 7. You shall not possess any paraphernalia for the use of controlled substances.
 11. You shall not view or possess sexually

explicit material as defined in RCW 9.68.130(2) without prior approval of DOC and your sexual deviancy treatment provider.

CP 391-92.

B. QUESTIONS PRESENTED

1. Where the state chooses to go to trial on an amended information charging two counts “in the alternative,” it is error for the trial court to allow the state to remove the “alternative” charging, charge the two counts as separate crimes, and add a new third count?
2. The convictions for both attempted second-degree rape and second-degree child molestation were both based on the same alleged touching of the victim’s vagina, without penetration. Was double jeopardy violated by the two convictions for the same act? Did the trial court further violate double jeopardy by reducing the molestation conviction to writing and entering sentences based on both charges?
3. Where the prosecutor repeatedly, over defense objection, incited the jury’s passions and prejudices, denigrated the defense, implied a negative inference from the exercise of fundamental constitutional rights and bolstered its witness’ credibility, is reversal and remand for a new trial required where credibility was the crucial issue at trial?
4. Was counsel prejudicially ineffective in his multiple failures at trial?
5. Was Mr. Teters deprived of his rights to present a defense when the trial court excluded evidence relevant and material to his defense?
6. Should the Court review the sealed discovery in camera and reverse and remand because of improper failure to release the materials to the defense as part of discovery?
7. Were conditions of community custody improper where they were not supported by statute, not crime-related, several of them were so vague they violated due process and several of which infringed

upon fundamental First Amendment rights?

C. STATEMENT OF THE CASE

1. Procedural Facts

Appellant Paul Teters was charged in Clark County by second amended information¹ with second-degree rape of a child, attempted second-degree rape of a child and second-degree child molestation. CP 309-310; RCW 9A.28.020(3)(b); RCW 9A.44.076; RCW 9A.44.086. Pretrial proceedings were held before the Honorable Judges John Nichols on July 8 and 18, 2014, Gregory Gonzales on August 26 and December 2, 2014, Barbara Johnson on February 18 and 19, 2015, Suzan Clark on May 28, 2015, and Daniel Stahnke on October 26, 2015, February 17, 18, 22 and 26, March 11, April 4 and May 3, 2016, and a jury trial was held before Judge Stahnke on May 16-19, 2016.² The jury hung on the first count but convicted on counts II and III. CP 362-64; RP 958-59.

At sentencing on June 15, 2016, Judge Stahnke imposed standard-range sentences for both counts, including an indeterminate sentence. CP 377-88; RP 975-81.³ Teters appealed and this pleading follows. See CP 402.

¹The trial court's error in allowing the Second Amended Information to be filed mid-trial is discussed in the argument section, *infra*.

²The verbatim report of proceedings consists of 7 chronologically paginated volumes, which will be referred to as "RP."

³The error in these multiple convictions and sentences is discussed, *infra*.

2. Testimony at trial

H was about 12 years old in July of 2014, when her mom was dating a man named Patrick Teters. RP 340. H and her family went to a Fourth of July celebration at the home of a relative of Teters, where there were a lot of people, including kids running around and engaging in activities. RP 341-42.

Most of the day, H said, she “just kind of like hung out with the kids.” RP 342-43. Some of the time, however, she spent with Peter’s Teters’ brother, Paul Teters. RP 342-43. There were about 100 people around that day, many of them engaging in the same activities, like riding all-terrain vehicles (ATVs). RP 342-43, 371. Paul and Peter went on ATVs with H, who rode on Paul’s ATV and helped when Peter’s ATV got stuck and they had to pull it out. RP 343. But at trial, H would testified it had made her uncomfortable when Paul drove fast and told her to hold on tighter. RP 371-72.

Also that day, Paul was shooting guns and showing some of the kids - including his own - how to do it. RP 344. H and a friend went over with H’s mom and he showed them, too. RP 344. H’s mom’s boyfriend started showing his daughter. RP 371-72. Paul let the friend shoot the gun first and only later let H do it, too. RP 343-44.

At some point, H said, she went downstairs at the house on her own to go charge her phone. RP 345. H said Paul came downstairs and he was asking her what she was doing and joked

about her being sneaky or something. RP 345. He was being playful, she said, and tried to take her phone, then was pushing her away when she grabbed for it. RP 345. H thought he was pushing her on the zipper of her pants, which made her uncomfortable and seemed to her “really inappropriate.” RP 345. She admitted she did not say anything to anyone about it but said she dismissed it, thinking it might have been an accident. RP 345. On cross-examination, H said, she was irritated by him because he was trying to look through her pictures and her phone. RP 375. She thought it was “unnecessary” and he was keeping her phone from her. RP 375.

H said that, at some other time, Paul was “like, showing off trying to do pull-ups and stuff” and suggested she try. RP 346. She said she could not, so he offered to help. RP 346, 372-73. She then tried and she said he “just kept, like, grabbing me right there.” RP 346. She said he had put his hand on her butt and trying to help her up and she just kept trying to “king of wiggle away.” RP 346. Basically, she said, his hands were in between her legs helping her do the pull-ups. RP 347.

Again, H admitted, she did not say anything. RP 347. She said she tried to pretend like it was not happening and did not really know what was going on. RP 347. She said she wanted it to stop and did not believe someone “would try and do that[.]” RP 348.

H’s mom, Leah Lowry saw Paul helping her daughter

when H was hanging upside down on the pull-up bar. RP 424. She said “they seemed like they were just playing” and H seemed to be in a good mood. RP 424, 469. H made no complaints to her mom about Paul at that time or any other that day. RP 470.

Lowry, had never noticed Teters paying any special attention to H that day. RP 413-17. She opined that Teters was really insistent on his daughter learning to shoot a gun even though she did not seem to want to. RP 421. She thought he was always around when she checked on her daughter that day. RP 423. But she also said her daughter seemed at one point to “join back in with the kids.” RP 423. Lowry was there with others in riding ATVs and shooting handguns, when Paul and H were doing it, too. RP 466-67. Lowry admitted that she repeatedly gave her daughter permission throughout the day to go do things like shoot the guns, ride the ATVs, go on a trampoline with other kids and other activities. RP 466-67. She conceded that H seemed to both be having fun as they interacted. RP 467.

H also mentioned something about them talking about her being on the dance team and asking her to show him her routine. RP 348. She did and it included a move which showed her underwear and he made some comment about seeing it and it was “adult” and not very “appropriate” of her. RP 348. H said he told her she was “like, wearing scandalous things” and looked

like an adult.” RP 348. At one point when they were chatting, H went and got Paul some beer. RP 349-50.

Later on, H went out and sat on a blanket with her mom and her mom’s boyfriend to watch fireworks. RP 351. That lasted a long time. RP 352. H did not really see or interact with Paul except briefly for that whole time. RP 352. After the fireworks, it was getting late, so she went into a room where a bunch of other kids were watching television. RP 353. She was going to sleep on the bed and her mom and boyfriend were sleeping on the floor. RP 354. Someone had put on a Disney movie and they were laying there watching it. RP 355.

Paul came in and was watching the movie as well, sitting on the edge of the bed. RP 355-56. H did not remember when he came in or whether the hall lights were on or off. RP 356. She also did not recall him saying anything to her in particular when he came in. RP 359. She was under the blanket and he was sitting by her feet. RP 356.

H admitted that Paul actually seemed to be really watching the movie and very interested in it. RP 359. So did H’s mom, who was in the room, on the floor. RP 427-28. So did Paul’s brother, Peter, also there. RP 529-35.

H fell asleep. RP 359. At some point, she said, she woke up when she felt someone’s hand in her pants. RP 359. She could not really describe how his hand was but said her shorts were look and she thought he had “his hands there, like, trying

to move his hands around.” RP 359. She said when she woke up his hand was underneath her underwear in her pants, touching her vagina. RP 360. She said the hand was “moving around and stuff” and “trying to feel me and stuff” and she was kind of trying to move away and pretend it was not going on. RP 360. She did not open her eyes. RP 382.

At trial, when the prosecutor specifically asked if he was “outside or if he was inside,” H responded, “[h]e tried to go inside,” but she kept moving away “so he couldn’t.” RP 3601-61. But when asked if his finger ever went inside, H responded, “I felt that it did, but I just moved away[.]” RP 361. She said she felt very uncomfortable and violated, so she started kind of kicking away, told him to stop and told him to go to bed. RP 361.

H explained that she did not yell or wake her parents despite what she said was going on, because she “didn’t want to cause a big scene[.]” RP 361. She actually was trying not to wake them up. RP 362-63. H testified she was saying “stop, stop” and told Paul he needed to leave the room and go to bed, but he did not respond. RP 361. She said she became louder and started to push him away. RP 362. H said Paul then “kind of just pretended like he just woke up[.]” RP 362. He said something like he was sorry, he fell asleep or something, kind of mumbled, then walked out. RP 362.

H sat up. RP 363. Her mom woke up and started

comforting her, asking what had happened, so H crawled into her mom's arms. RP 364. At trial, H would first say she was crying when her mom woke up but later she said it was only "[e]ventually" that she cried, when she "had to talk about it." RP 397.

H told her mom she woke up and Teters was trying to touch her and she did not feel safe. RP 364. She was not specific about where or how she had been touched but denied that she was herself "kind of confused about what happened" herself. RP 362.

About a year before trial, however, H had given an interview to the defense. RP 385. In that interview, she had admitted that, when she was talking with her mom at that point, she was "kind of confused on what happened" herself. RP 385.

Also in that interview, she was specifically asked if the touching was on the outside or if he ever went inside. RP 385-86. She admitted at trial that she understood the question at the time. RP 386. The answer she gave then was, "[i]t was just on the outside." RP 386. She maintained it was both outside and inside but said she just had not been comfortable saying that at the time. RP 387. She said he kept touching and rubbing her and trying to stick his finger inside. RP 390.

At trial, H admitted she was usually a hard sleeper. RP 368. She could not really explain how, if Paul was sitting on the

end of the bed where her feet were, with his back against the wall, he had managed to get his hand underneath the covers and inside her pants while she was lying on the bed. RP 368, 381. When asked to confirm that he was sitting on top of the covers, she said, “I don’t remember.” RP 380.

Lowry, who was in the room, claimed she did not fall asleep and that she was wondering why Paul was in the room, but said nothing. RP 428-30. She did not want to seem “overly dramatic,” she explained, but also said she tried to wake up Peter to ask about Paul being there. RP 429-30. He did not wake up. Lowry said she herself fell asleep and when she woke up, looked over where H was lying. RP 429-30. Unlike H, Lowry said Paul was not sitting up anymore but was lying next to H, H with her back on the bed and Paul “not at all where he fell asleep.” RP 432. Lowry thought Teters seemed “[s]ort of hunched on his side.” RP 432.

Lowry could not see what was happening, she admitted. RP 433. The only light in the room was the glow of the television. RP 471. She opined, however, that there was a blanket over both and that his hands were under the blanket. RP 433. But on cross-examination, Lowry admitted she could not actually see his hands. RP 471. Lowry said he looked up, she gave him a meaningful look showing she was watching, he got up quickly and left the room. RP 433-34, 489.

Lowry did not remember what H then said. RP 434. She

did recall that it was something just like “[h]e was touching me,” but no details. RP 474. She was clear that H did not say anything about him touching her vagina at that time. RP 474-75. When she spoke to her mom, H did not say anything about him trying to stick his finger in her vagina. RP 369.

Lowry admitted, on cross-examination, that she asked her daughter, “[h]ow come you didn’t yell, I was right here?” RP 474. And she conceded that, while she was right there, she never heard her daughter say anything, call out or say “stop.” RP 474.

The 9-1-1 call Lowry made was played at trial. RP 484. In it Lowry told police that she thought her boyfriend’s brother had been touching her daughter and had “his hands on her vagina.” RP 485. She admitted, however, she only saw him “over” her daughter, that it looked inappropriate but she did not actually see him touching her. RP 485-86.

Lowry also told police that she asked specifically, “[w]as he touching you?” before her daughter said anything. RP 486. She also told police H said “[h]e came in when I was sleeping,” not that he had been in the room when they were watching a movie and all fell asleep. RP 486.

Well before the incident, H was diagnosed with an anxiety disorder. RP 381. The prosecutor established on redirect that she would get “a little antsy” or a “little bit nervous” but she never “thought something happened that didn’t because” of it.

RP 394. She also said she never got “super vivid nightmares” and had never “not been able” to tell the difference between a nightmare and something that really happened as a result. RP 394-95.

On cross-examination, she admitted she had cried “before” with anxiety. RP 395. She denied, however, going to her room and crying for days. RP 395. When counsel said, “[y]our mom said you did,” the prosecutor’s objection was granted and the comment stricken. RP 395. H then said she would get “really nervous” about things and would stress out and it would make her cry “sometimes.” RP 395-96.

H’s mom testified that, in fact, H would express her anxiety by crying sometimes and that it sometimes happened “for days on end.” RP 372.

Clark County Sheriff’s detective Joe Swenson arrived at the house at about 2:30 in the morning and ultimately “bagged” Paul’s hands. RP 491-98. Swenson admitted he did not seek swabs from H’s genital area to see if Paul’s DNA from allegedly touching H was there. RP 505. The officer averred, “I thought that somebody else was following up with that.” RP 506.

Vancouver Police Department Detective Deanna Watkins conducted a “forensic” interview of H about three weeks later. RP 507-11. Watkins conceded that officers did not ensure that any body swabs were obtained from H in her genital area. RP 516.

Peter Teters first opined that his brother seemed “only interested” in H throughout the day. RP 520. He admitted, however, he saw Paul talking to his wife, cooking, “working on a brisket” and engaging in other tasks, too. RP 521-29. Ultimately, he admitted he was not really paying particular attention to his brother that much. RP 522, 529.

Theresa Malin, who was hosting the party, talked about Teters leaving for awhile and going to the store for her. RP 537. After she was told the accusations, Malin stayed with H until police came. RP 539-40. Before that, however, she did not really see H or keep track of her because Malin was busy, running the party. RP 541. Malin thought it would be “inappropriate” for someone to take a kid that was not their own on an ATV. RP 543. She was unaware that he and others took her kids out that day. RP 543.

Wendy Kashiwabara, who had worked at the state forensic lab, described “transfer” of DNA, either by direct contact, such as holding hands, or “secondary,” if people touched the same item and a transfer could occur. RP 556-57. The DNA would be the same in each situation but she thought there would be a “higher likelihood of DNA transfer” if there was a bodily fluid involved. RP 557.

Kashiwabara testified that she used “PCR” testing but did not explain which particular kit she used, how many cycles were used or anything similar. RP 561. Once she developed a DNA

profile, she said, she would run a “series of statistics” to see “how likely it is” in the population. RP 562. With the samples she was sent of the swabs in the case, she sampled a portion of each, used chemicals to extract DNA, “isolated” the DNA, quantified it, amplified it, separated it out again, and then tested the results. RP 564. The swabs were collected from his left and right fingers. RP 564. Both tested negative for semen. RP 566. Human amylase was detected on the right finger swab. RP 566-67. The DNA on Teters’ right hand was mostly his own. RP 570. H was excluded as a possible source of the other “minor” part of the DNA mix. RP 570, 572.

The left finger swab had no indications of amylase, which she said meant no saliva. RP 568. DNA was found, however, consistent with Teters and H. RP 568-69, 572.

Kashiwabara testified that DNA can “[a]bsolutely” transfer when two people handled the same object. RP 575. She agreed that handling the same objects throughout the day was a possible reason for a mixed DNA sample. RP 576. The scientist could not tell the difference between DNA transferred between direct contact or secondary. RP 576. She was never asked to see if she could find DNA from skin cells which would have been shed if someone had touched H’s genital area, for example by processing swabs. RP 576.

Factors which affect all types of transfer are hand washing, passage of time, the surface involved and the amount

and duration of contact. RP 578-79. Sharing a phone, a pull-up bar, a gun and other objects with a lot of other people might result in seeing more than two DNA profiles. RP 581. But she conceded that even if five people handled the same object, she would not necessarily find a mixture of five different people's DNA on it later. RP 584.

Kashiwabara opined that she would expect there to be more DNA in bodily fluid than in skin cells. RP 581. She admitted that items such as the handle of a gun or the grip of an ATV was likely to have more transfer. RP 581-82.

Clark County Sheriff's Office (CCSO) deputy Dan Fronk was there when Paul was awakened by officers and said he seemed kind of angry or agitated and kept asking why they were waking him up. RP 646-51. The deputy conceded that Paul explained to officers about his PTSD to explain his animated state. RP 654.

The deputy explained to Paul there had been some "type of allegation, misconduct," but said he did not know the details. RP 648. Fronk said Paul was kind of "animated," saying something about him not having "been involved in any fistfights." RP 648. The officer asked if anything happened with Paul and a kid and Paul said there was "a ton" of kids at the party. RP 649, 655. The officer asked what had happened "a short time ago" and Paul said he watched a movie with his brother, his brother's girlfriend and the girlfriend's daughter, H,

then came upstairs afterwards and fell asleep on the couch. RP 649.

Paul said nothing out of the ordinary happened. RP 649-50. More specifically, when asked by the prosecutor if he mentioned H getting upset or anything similar, the officer said Paul did not mention it. RP 650.

Dr. Erin Meadows, who had no training specific to doing sexual assault exams, was working the emergency room and conducted the exam of H on July 5, 2014. RP 664-68. The doctor asked H what had happened and H said she had been lying in bed and was touched by somebody. RP 671. H also said he “put his hands into her pants and felt her genitalia with his fingers.” RP 671. On the written chart, in a section with “click boxes,” the doctor indicated, “concern was for sexual assault, that she wasn’t complaining of any pain, but that she had included a foreign body penetration [-] that a finger had penetrated.” RP 671.

There was no injury or tenderness of any kind, nor did H complain of any soreness. RP 672.

Marcia Schmidt, Paul’s elderly aunt, recalled seeing him that day “greeting” and showing people around, telling them what games and events were available to kids and adults and kind of “showing” people around a little. RP 679-81. She thought he spent more time interacting with adults but also saw him with his three little kids. RP 681-82. He had a “home

brew” he was sharing and he was also showing people the camping area down by the creek and where the ATVs were. RP 684.

Schmidt did not see Paul focus attention on any one person over another. RP 682. She also never saw him act “inappropriately” with anyone. RP 682. She agreed that she was not with him all day or watching him “closely” but said she saw him “buzzing around talking to a lot of people.” RP 686.

Robert Teters, a capital bond fund manager for school districts, testified about his son, Paul, and seeing him interacting with guests that day. RP 688-91. He did not notice Paul paying particular attention to anyone before he left early that evening. RP 691. Robert Teters detailed the PTSD symptoms he had seen in his son, Paul, such as fidgeting of the hands, inability to stay in one place very long, having problems around crowds, having to get up and walk and having an inability to sleep at night. RP 693. Sometimes, Paul got more anxious around people, his dad said, so the movement would get more extreme. RP 694.

Paul Teters testified on his own behalf. RP 698. He described being 100 percent disabled as a veteran from his combat experience and PTSD. RP 698. It had gotten worse in the past few years and manifests through twitching and rubbing and constantly needing to move, not sitting in any one place too long. RP 699.

The day of the incident, Paul said, he was reheating food and at one point took his daughter to learn how to shoot guns, with other kids coming along. RP 700-706. He described having physical contact with H when he moved her hand on the ATV gears and moved her hand to move the weapon she was pointing improperly. RP 707. He was helping his daughter at the pull-up bar and H wanted to do some, too, so he helped her. RP 707-708.

Paul said he and H were really not alone that day. RP 709. The only time he could recall them being alone was a few moments on the ATV ride. RP 710. He also said he handled her cell phone a couple of times, before the “pull-ups” incident and again when Lowry said something about some silly messages from a boy on H’s phone. RP 713. He and Lowry looked at H’s phone and chuckled about it a little. RP 713.

Paul denied pushing H on her “pelvic area” when she was trying to get back her phone. RP 739. He also denied any improper contact with H. He said he had stopped at the room, told his brother he looked “pretty drunk,” and grabbed H’s cell phone from the bad, teasing her. RP 718. She lunged and grabbed it from his hand. RP 719. She seemed more “agitated” and not like it was a joke like before, so he apologized and said he would let her mom know to check it next time. RP 718.

Paul left, helped his wife with the kids, had a cigarette outside with a female friend, came back inside and checked on

his daughter, then heard the movie on in the room where his brother, Lowry and H were lying. RP 720-21. He asked Lowry if he could sit on the foot of the bed and she said yes. RP 722. He did so but made it clear he never got under the covers. RP 723.

Paul and Lowry talked about the movie that was playing, because Teters knew a lot about the movie and was kind of a film “buff.” RP 725-26. The conversation ended when he offered to tell her about how violent the actual events were and she declined. RP 726. Things got quiet and he started getting a “little nervousness” and needing to move, so he asked if he could turn off the movie and she said “that’s fine.” RP 727. He did so and walked out. RP 726.

He described the nervousness as increasing the twitching of his leg, making his hands rub or tap, sweating and other signs of stress. RP 727. He explained this made him need to move not to feel “stuck” or “trapped in one place.” RP 726. It started when he was on the bed and was his “cue” to move. RP 726.

Paul did not hear H say anything and did not really pay attention to her the entire time. RP 728. He denied touching H inappropriately at all. RP 729. More specifically, he said he never intentionally touched H under the covers, was above the covers the entire time, never touched her genital area, did not try to molest her and never had intentional sexual or

inappropriate conduct that day. RP 734.

When he was awakened by officers, Paul explained, he was having a night terror, was pretty confused and said something about not fighting anyone. RP 730. He actually did not remember much about talking to police. RP 760.

Paul did not dispute saying something about H wearing a “thong,” but it was after Lowry and he were smoking and Lowry had her daughter show Paul her routine. RP 753. He commented, “you let your daughter wear thongs?” RP 751-60. Lowry said it was H’s dad who allowed it. RP 760.

Paul Teters’ wife, Sarah, confirmed that he was cooking and shopping and greeting people that day. RP 774. She saw him interact with H and did not see anything “inappropriate.” RP 777-78. When he came in to sleep that night he seemed “normal” and there was no “commotion” or anything in the bedroom across the hall. RP 782. After the time when the incident supposedly occurred, she interacted with H and she did not seem upset about anything. RP 783.

Sarah Teters denied saying anything to her sister-in-law about thinking that her husband’s interactions with H that day were odd. RP 790. She admitted she was upset for how much time he was spending with other people besides her that day, and at that moment he was talking with H, so she commented on that. RP 790. It was not the interaction with H specifically which upset her but in general that he seemed to want to be

with people other than her. RP 791. She and her husband were no longer together at the time of trial. RP 792.

D. ARGUMENT

1. THE COURT ERRED AND THE CHARGES ADDED MID-TRIAL MUST BE DISMISSED

Defendants in a criminal case have a fundamental due process right to fair notice of the nature of the accusations they face at trial. State v. Vangerpen, 125 Wn.2d 782, 787, 888 P.2d 1177 (1995). CrR 2.1(d) honors these rights by limiting the authority of the prosecution to amend the charging document. See State v. Downing, 122 Wn. App. 185, 194, 93 P.3d 900 (2004). Under the rule, amendment may occur before verdict “if substantial rights of the defendant are not prejudiced.” See State v. Pelkey, 109 Wn.2d 848, 745 P.2d 854 (1987).⁴

In this case, just before trial, the prosecution filed an amended information. RP 212-17; CP 190. That information charged two counts in the alternative, count 1, second-degree rape of a child and count 2, second-degree child molestation. CP 190. That same day, the prosecutor submitted proposed jury instructions including a “to-convict” for the child molestation count “as charged in the alternative in Count 2.” CP 349-56. The prosecutor told the court she had removed a charged count (count 3) and amended counts one and two so they were no

⁴A different standard is applied for constitutional reasons when the amendment occurs after the prosecution rests its case. See Pelkey, 109 Wn.2d at 487,

longer charged as separate crimes but were now charged with “count 2 as in the alternative of Count 1.” RP 216-17.

Trial commenced and the prosecution presented the testimony of H, her mom, Detectives Swenson and Watkins, Patrick Teters, Theresa Malin and forensic scientist Kashiwabara. RP 339, 413, 491, 507, 516, 532, 550. The prosecutor then prosecutor moved to amend the charges. RP 621. The “second amended information” now alleged three separate counts. CP 309-10; RP 621. Count I was second-degree rape of a child. CP 309. Count II was attempted second-degree rape of a child. CP 309. Count III was second-degree child molestation. CP 309-10. None of the counts was charged in the alternative. CP 309-10.

The prosecutor conceded that the three separate counts were for the exact same act. RP 621. She dismissed concerns of “multiple” punishment, however, by saying the counts would all be “same criminal conduct” if there was more than one conviction. RP 621. She made it clear that she was not adding the third count as an “alternative” and that she removed the “alternative” language from the two charges listed in the previous information, as well. RP 622.

Counsel objected but, with little discussion, the court said, “[s]econd amended information granted.” RP 622. Counsel then asked for clarification of whether jurors would be instructed “in the alternative” and the court said, [n]o.” RP 622. The court

told counsel that the parties would just later “have the merger issue[.]” RP 622. Counsel was concerned there might be three convictions for “all one incident” and started talking about instructions, but the court again said there was no issue until sentencing, because it was irrelevant to “the decision the jury makes” and it was “something we have to decide later.” RP 623.

Instruction 10 was the “to convict” for count 1, the second-degree rape of a child. RP 850-51. Instruction 11 described the crime of attempted rape of a child charged in count 2, and Instruction 14 had the “to convict” for that crime. RP 852-53. Instruction 15 described the crime of child molestation charged in count 3 and instruction 17 was the “to convict” for that crime. RP 853-54. None of the instructions charged the jury with deciding the three separate charges “in the alternative” or with considering one charge before considering the others. RP 850-54; CP 339-54.

The trial court erred in granting the state’s request to add new charges midtrial. Under CrR 2.1(d), a court may permit amendment of an information at any time before verdict, if the “substantial rights” of the defendant are not prejudiced. This Court reviews the trial court’s decision for abuse of discretion and the defendant has the burden of showing prejudice. State v. Ziegler, 138 Wn. App. 804, 808, 158 P.3d 647 (2007).

That burden is met in this case. The second amended information, accepted by the trial court mid-trial, added new

charges against Mr. Teters. The state chose to go to trial on two counts charged in the alternative. CP 246; RP 212-16. For the first two days of trial, Teters faced two counts charged in the alternative. CP 246; RP 212-16. With alternative charges, the defendant is only convicted of one count. See State v. Womac, 160 Wn.2d 643, 160 P.3d 40 (2007).

Thus, before the amendment, Teters faced one conviction for either second-degree child rape or second-degree child molestation.

With the mid-trial amendment, however, Teters faced three separate charges. He continued to face the second-degree child rape charged in count 1, but now also faced a child molestation count (moved from count 2 to count 3), not as an alternative to count 1 but a separate charged crime. CP 309-10. Further, he now faced a separate charge of attempted second-degree child rape, charged not as an alternative, but as a separate crime. CP 309-10. Each had a separate “to convict.” CP 339-62. And verdicts were rendered on each, not after considering and being unable to decide on the higher crime, but as separate crimes from each other. CP 362-65.

Thus, the second amended information increased the charges against Teters mid-trial. It did so after the alleged victim, her mom, the lead detective and many other witnesses including the forensic examiner had testified and been cross-examined. After days of proceeding on allegations charged in

the alternative for one expected conviction, suddenly Teters was faced with three.

This is far different than what happens when RCW 10.61.003 or RCW 10.61.006 applies. Under those statutes, when a defendant is charged with an offense, he may instead be convicted of a lesser degree, lesser “included” or attempt to commit the charged offense. But that is a question of whether a defendant charged with a higher crime is put on notice that, for that count, he could be convicted of something lesser. State v. Fernandez-Medina, 141 Wn.2d 448, 6 P.3d 1150 (2000). And in such cases, the jury is instructed to consider the “included” offense only after it fully and fairly considers the charged crime and as an alternative. See, e.g., WPIC 4.11. The statutes do not permit convictions in addition to the higher offense; they permit convictions instead of the higher crime, for certain offenses deemed “included” in the original charge.

Reversal and dismissal of the newly added charges is required. Ziegler, supra, is instructive. In that case, the state moved to amend the information midtrial, arguing it was proper under CrR 2.1(d). Zielger, 138 Wn. App. at 807. The trial court allowed the amendment, which reduced a child rape charge to the lesser crime of child molestation and added two first-degree child rape charges for one victim based on her testimony at trial. 138 Wn. App. at 807.

On review, the state argued that, because the amendment

was requested prior to the state having rested its case, it was proper. 138 Wn. App. at 809-10. The appellate court agreed for the reduction in charge but not for the new counts. 138 Wn. App. at 810-11. Those counts were not “merely the amendment from one crime to a similar charge,” the Court noted, or changing “the means of a crime already charged.” 138 Wn. App. at 811. Further, the Court noted the unmistakable prejudice to a defendant when additional criminal charges are added after the alleged victim has testified and been cross-examined at trial. 138 Wn. App. at 811.

It is significant that counsel was utterly unaware of or at least completely failed to argue to the court on the relevant law. Both the Sixth Amendment and Article 1, § 22 of the Washington Constitution guarantee the accused the right to effective assistance of counsel. Strickland v. Washington, 466 U.S. 668, 686, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); State v. Mierz, 127 Wn.2d 460, 471, 901 P.2d 286 (1995). Counsel is ineffective if, despite a strong presumption he was effective, his representation was “deficient” and that deficiency prejudiced his client. See State v. McFarland, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995). Ineffective assistance of counsel is a mixed question of fact and law, reviewed de novo. State v. Sutherby, 165 Wn.2d 870, 883, 204 P.3d 916 (2009).

Counsel’s representation is “deficient” if it fell below an objective standard of reasonableness, based on the

circumstances of the case. State v. Thomas, 109 Wn.2d 222, 225-26, 743 P.2d 816 (1987). Here, counsel was clearly unaware of the relevant law and made no argument - only a pro forma motion - in this case. The trial court abused its discretion in allowing the state to add counts 2 and 3 midtrial. Mr. Teters was convicted of those charges and prejudiced by their addition mid-trial. The convictions for those two charges (counts 1 and 2) should be reversed and dismissed with prejudice.

2. APPELLANT'S RIGHTS TO BE FREE FROM DOUBLE JEOPARDY WERE VIOLATED

In the alternative, reversal and dismissal of the second-degree child molestation conviction for count II would be required even if it and the attempted rape had been properly charged, because the conviction on both counts violated double jeopardy.

First, the attempted child rape and child molestation convictions were the same for double jeopardy purposes, so the lesser conviction must be reversed. Both the Fifth Amendment and Article 1, § 9 of the state constitution prohibit a person being twice put "in jeopardy" for the "same offense." State v. Freeman, 153 Wn.2d 765, 768, 108 P.3d 754 (2005); Garrett v. United States, 471 U.S. 773, 779, 105 S. Ct. 2407, 85 L. Ed. 2d 764 (1985).

The state may bring multiple charges based on the same criminal incident, without automatically offending double

jeopardy. See State v. Michielli, 132 Wn.2d 229, 238-39 937 P.2d 587 (1997); Whalen v. United States, 445 U.S. 684, 688-89, 100 S. Ct. 1432, 63 L. Ed. 2d 715 (1980). But a court may not enter multiple convictions or punishments for two offenses which are legally deemed the “same offense.” See In re Pers. Restraint of Orange, 152 Wn.2d 795, 815, 100 P.3d 291 (2004); Ball v. United States, 470 U.S. 856, 864, 105 S. Ct. 1668, 84 L. Ed. 2d 740 (1985). In this case, both the conviction for count 3, the second-degree child molestation and count 2, the attempted second-degree child rape were for the “same offense.”

At the outset, this issue is properly before the Court. A violation of double jeopardy prohibitions is a manifest constitutional error which may be raised for the first time on appeal. State v. Jackman, 156 Wn.2d 736, 746, 132 P.3d 136 (2006).⁵ This Court applies de novo review. See State v. Vladovic, 99 Wn.2d 413, 422, 662 P.2d 853 (1983); see State v. Adel, 136 Wn.2d 629, 631-32, 965 P.2d 1072 (1998).

Applying such review, here, even if counts two and three had been properly charged, the conviction on count three would have to be dismissed for violating double jeopardy. The trial court and prosecutor were simply wrong in their view that there were no “issues” of multiplicity until sentencing - and that any issues were resolved simply by treating the convictions as “same

⁵Counsel’s ineffectiveness in addressing this issue is discussed, *infra*.

criminal conduct.” RP 621-23. Both the U.S. and Washington Supreme Courts have explicitly held to the contrary. State v. Turner, 169 Wn.2d 448, 454-55, 238 P.3d 461 (2010); Ball, 470 U.S. at 865. Well before trial in this case, the state’s highest court had held - repeatedly - that “even a conviction alone, without an accompanying sentence,” can constitute punishment for the purposes of double jeopardy. Turner, 169 Wn.2d at 454-55; see Womac, 160 Wn.2d at 657-58.

For example, in Womac, the defendant was convicted of three crimes for the same death and the trial judge entered judgment on all three but only imposed sentence on one. 160 Wn.2d at 657-58. On review, the court of appeals directed the trial court to also “conditionally dismiss” the other two counts, thus allowing them to be held in abeyance in case the first conviction was set aside at some point in the future. Id. The Supreme Court reversed. 160 Wn.2d at 656. While Womac had only been sentenced for one of the convictions, the Supreme Court said, “[c]onviction, and not merely imposition of a sentence, constitutes punishment for double jeopardy purposes.” 160 Wn.2d at 656. The convictions could not be held “in abeyance,” they could not be reduced to writing or in any way registered as valid and must instead be completely dismissed. 160 Wn.2d at 660.

In this case, even if it had been properly charged instead of improperly added midtrial to the prejudice of the defense, the

conviction for second-degree child molestation would have to be reversed and dismissed with prejudice as a violation of double jeopardy. Where, as here, there are two convictions under different statutes for the same conduct, the determination of whether double jeopardy has been violated depends in large part on whether the legislature intended separate offenses to occur. See In re Personal Restraint of Francis, 170 Wn.2d 517, 523-24, 242 P.3d 866 (2010).

First, the Court looks at the statutes themselves to see if there was an express or implied intent to create separate offenses - for example, such as an “anti-merger” clause for burglaries and the underlying offense. State v. Calle, 125 Wn.2d 769, 777-78, 888 P.2d 155 (1995). If there is no such evidence, the Court then applies the so-called “Blockburger” test, named after Blockburger v. United States, 284 U.S. 299, 52 S. Ct. 180, 76 L. Ed. 306 (1932). Calle, 125 Wn.2d at 777-78. This test looks at the elements of each crime as charged and presented and asks if they criminalize the same conduct. See id. If so, it is presumed the Legislature intended to punish both offenses as one by punishing only the higher crime. Freeman, 153 Wn.2d at 772-73.

Here, there is no “anti-merger” statute. Further, the offenses were the same under the Blockburger test. Two offenses are not the same if there is an element in each “not included in the other, and proof of one offense would not

necessarily also prove the other.” See State v. Vladovic, 99 Wn.2d 413, 423, 662 P.2d 853 (1983). In general, courts have recognized that child molestation and child rape are not always - but can be - the same offense under the Blockburger test. See State v. Land, 172 Wn. App. 593, 295 P.3d 782 (2013). Child rape requires “sexual intercourse” with a child, which means either penetration or any act of sexual contact involving sex organs and the mouth or anus. RCW 9A.44.079(1); RCW 9A.44.010(1). Child molestation requires proof of “sexual contact,” meaning “any touching of the sexual or other intimate parts of a person done for the purpose of gratifying sexual desire of either party or a third party.” RCW 9A.44.089(1); RCW 9A.44.010(2).

As a result, where molestation and rape are charged for a single act of sexual contact involving the mouth or anus and sex organs, the two crimes are “the same in fact.” See Land, 172 Wn. App. at 599-600. But where the touching of sexual parts for sexual gratification also includes proof of penetration, there can be separate convictions, because the touching up to the point of penetration is molestation but any penetration, however slight, amounts to child rape. Id.

Here, the alleged molestation and child rape were for the same acts but there is an important distinction: the charges were second-degree child molestation and attempted second degree child rape. CP 309-10. An attempt requires the

defendant to take a “substantial step” towards commission of a crime, defined as “conduct that strongly indicates a criminal purpose and that is more than mere preparation.” State v. Townsend, 147 Wn.2d 666, 679, 57 P.3d 255 (2002).

The “substantial step” the prosecution relied on in arguing guilt for both the attempted rape and the molestation was the very same conduct- the touching of H’s genitals. Indeed, in arguing guilt, the prosecutor relied on the same act for all three counts, with the penetration claim the only difference for the child rape count. RP 874-75. The prosecutor argued that digital penetration had occurred and was second-degree rape of a child - count 1, the count for which the jury eventually hung. RP 877-79; see CP 309-10, 372. For the attempted rape, count 2, the prosecutor relied on the alleged touching of the genitals as “clearly intending to penetrate” and thus proof of a substantial step towards committing second-degree child rape. RP 896-98. For the child molestation, again, the prosecutor relied on the alleged touching of the genitals in the bedroom, as done for “sexual gratification” and thus amounting to child molestation. RP 899-901. The two convictions were thus the same in fact and law. See State v. Hughes, 166 Wn.2d 675, 682-84, 212 P.3d 558 (2009).

Notably, the jury was not instructed that they had to find separate incidents for each count - consistent with the lower court’s belief that multiple convictions was not an issue if “same

criminal conduct” analysis was used in sentencing. See CP 339-62; RP 621-23.

The second-degree child molestation was the same for double jeopardy purposes as the attempted rape of a child in the second degree. The trial court should have dismissed the conviction for that count with prejudice. Instead, the judgment and sentence includes the molestation conviction as a separate, valid conviction. CP 377. Further, Mr. Teters was ordered to serve a sentence of 20 months and 36 months of community custody on that count. CP 381. Even if the attempted child rape charged in count 2 and the child molestation charged in count 3 had been properly charged, reversal and dismissal of count 3 would be required because that conviction violated double jeopardy.

It is significant that, like when the court allowed amendment of the charges, counsel appeared utterly unaware of the relevant law. Even when the trial court indicated its belief that double jeopardy was not an issue until sentence - and then was resolved by sentencing as “same criminal conduct” - counsel did not research the issue. If he had, he certainly would have found Womac and its progeny. Counsel was once again ineffective in representing Mr. Teters at trial.

3. MULTIPLE ACTS OF MISCONDUCT COMPEL REVERSAL

In addition, reversal and remand for a new trial would be

required even counts 2 and 3 were properly charged, because of the very significant, serious and prejudicial prosecutorial misconduct in this case. A prosecutor is a quasi-judicial officer who bears higher responsibilities than an average attorney. 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).

Prosecutors are supposed to act in the interests of justice and avoid being a “heated partisan” trying to “win” a conviction. 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). Further, prosecutors have duties not just to the victim or the public but also the accused to ensure a fair trial, with a conviction based solely on the evidence, not passions, prejudice or improper argument. See Monday, 171 Wn.2d at 676-77.

The prosecutor in this case fell far short of these duties. For both the misconduct to which counsel objected and that for which counsel stayed mute, reversal and remand for a new trial is required.

First, it is important to note the standards which apply. This Court examines misconduct in the context of the total closing argument, the issues in the case and the evidence at trial. State v. Johnson, Jr., 158 Wn. App. 677, 243 P.3d 936

(2010). If the defense attorney does not object below, the Court does not address the issue unless the misconduct was so flagrant and ill-intentioned that no curative instruction could have erased its enduring prejudice. State v. Thorgerson, 172 Wn.2d 438, 442, 258 P.3d 43 (2011). But where counsel objects, the Court asks only if there is a substantial likelihood that the misconduct could have had an effect on the verdict. See State v. Allen, 182 Wn.2d 364, 341 P.3d 268 (2015).

There is more than such a likelihood here. At trial, one of the issues was that Mr. Teters had a serious disability, PTSD, which manifested in behavior noticeable in the courtroom. The court itself noted Teters had some “odd symptoms” manifesting in the courtroom from his PTSD, including that he could not stop moving, something jurors could have interpreted negatively as nervousness based on consciousness of guilt. RP 33-36.

In her initial closing argument, the prosecutor declared:

So why did he spend so much time telling you about his war service and his PTSD? See, those are things that people have in common - - their common experiences, right? Everybody knows someone with anxiety, everybody knows someone who has PTSD, and everybody knows veterans. Everybody knows people that have served. So he was doing that to try and - -

RP 904. Counsel’s objections were repeatedly sustained. RP

903-904. The following exchange then occurred:

[PROSECUTOR]: I want you to ask yourselves, ladies and gentlemen, why that was offered. See, your jury instructions say you may not consider sympathy, prejudice, or personal preference. So you can’t decide this case because you feel bad for

someone or because you - - you know , stuff that they've said that's not relevant to the case that, you know, makes you feel like maybe you relate. Sympathy is not something to consider.

So why was that mentioned as often as it was? I submit to you, ladies and gentlemen, it was to distract you from the real - -

[COUNSEL]: Objection.

[PROSECUTOR]: - - issues of this case.

[COUNSEL]: Objection.

THE COURT: Overruled.

[PROSECUTOR]: It was to distract you from the real issue, which is whether or not he touched [H], and it was to distract you from the reasonableness of what he said overall.

RP 905 (emphasis added).

These arguments were misconduct. It is misconduct for the prosecutor to denigrate the defense and suggest that it is trying to “distract” or dissuade jurors from doing their duty. See State v. Negrete, 72 Wn. App. 62, 66-67, 863 P.2d 137 (1993), review denied, 123 Wn.2d 1030 (1994). Such comments amount to drawing a negative inference based on the defendant’s exercising his right to counsel, by suggesting counsel’s role is to deceive. State v. Gonzales, 111 Wn. App. 276, 282-83, 45 P.3d 205 (2002), review denied, 148 Wn.2d 890 (2003).

Thus, in Gonzales, the prosecutor committed misconduct in arguing that he had a “very different job than the defense attorney” because the defense attorney “has an obligation to his client” while a prosecutor had “an oath and an obligation to see

that justice is served.” 111 Wn. App. at 282-83. The appellate court found these statements improper, because with them the prosecutor “seeks to draw the cloak of righteousness around the prosecutor in his personal status as government attorney and impugns the integrity of defense counsel.” 111 Wn. App. at 282-83, quoting, United States v. Franscone, 747 F.2d 953, 957 (5th Cir. 1984).

Reversal is required. There is more than a reasonable probability the misconduct, to which counsel objected, could have had an effect on the verdict. The major issue at trial was whether the jurors would believe the crime had even occurred, which depended upon credibility.

In addition, the prosecutor committed flagrant, ill-intentioned and prejudicial misconduct to which counsel failed to object. Throughout argument, without objection, the prosecutor repeatedly 1) told jurors they had to ask themselves why H would “make this up,” thus implying the jurors had to find she was doing so in order to acquit, 2) drew negative inferences from the defendant’s exercise of his constitutional rights and 3) gave a personal opinion on the state’s crucial witnesses.

In closing argument, the prosecutor urged the jury not to rely just on the jury instructions, evidence and testimony, but also their “common sense.” RP 894. The prosecutor then went on:

So I want you to ask yourselves: Why would H[] make this up? I mean, you - - we know from all the testimony that she - - immediately after the defendant left, she crawled down on the floor, and she was crying, she was shaking, and, you know, she said that this happened. She's continued to, over the last to years you heard, be involved in this process, and she came here, and she told you all what happened.

So why would she make this up if it didn't happen? What does she get out of it? I mean, this is a 12-year-old girl who is clearly pretty shy, pretty awkward. You heard she has some anxiety. She gets anxious about things. She had to tell her mom that someone had sexually touched her. She had to tell the policemen about it, strangers. She had to go to the ER and get an examination. And you heard Dr. Meadows explain. . . they try to be as unintrusive as possible. . .but she still had to go and get a general exam by a doctor at 3:00 a.m... Her dad had to be called out, and he had to be made aware of the situation.

And then she had to go through a number of interviews. You heard she had to do a forensic interview. You heard she had to talk to defense counsel in a separate interview, where she was asked about what happened, and then she had to come in here, and she had to tell all of you and all of us here, whoever's in the courtroom, about what happened to her.

RP 894 (emphasis added). The prosecutor then asked jurors to rely on H's demeanor on the stand, how "[t]his wasn't fun for her," but "she still came, and she told you what happened, just like she told Dr. Meadows what happened the night that it did." RP 893-94 (emphasis added).

At that point, the prosecutor suggested the defense would likely suggest that she was "not making this up" but was just "confused," telling the jurors to ask themselves, "[i]s that reasonable?" RP 894. The prosecutor went on, "is it reasonable that this 12-year-old girl hallucinated him touching her vagina,

got confused about whether or not someone was touching her vagina?” RP 894. The prosecutor told jurors that the testimony of the defendant told them “there was no reason for her to make this up,” because they were getting along “fine.” that day. RP 894-95 (emphasis added). She then asked jurors, “[s]o why would this 12-year-old girl out of nowhere say that he touched her vagina when he hadn’t?” RP 896 (emphasis). A little later, she said, “[H] told you what happened to her[.]” RP 910.

A few moments later, in concluding her initial closing, the prosecutor declared:

People often challenge things that they don’t want to believe. I[t] can be a challenge in prosecuting cases like this, because people don’t want to believe that these things happen. But not wanting to believe that someone would do something like this is not a reasonable doubt, and you won’t see on any of these verdict forms or any of these instructions that the State has to prove why the defendant did this. It’s not something that we had to prove, and it’s not something that we know, but we do know that he did. We know that he did these actions, because that’s what all of the evidence shows us.

RP 909 (emphasis added).

These arguments were flagrant, prejudicial and ill-intentioned misconduct. First, it was simply not true the prosecution did not “have to prove why he did this.” RP 909. Instead, that was a misstatement of the law. The state accused Teters of second-degree child molestation, which requires proof of intent of sexual gratification, and attempted second-degree rape of a child, which, unlike rape of a child, requires proof of an intent to commit rape of a child. CP 309-10; RCW

9A.28.020(3)(b); RCW 9A.44.076; RCW 9A.44.086. A prosecutor commits misconduct by misstating the law, especially “the standard upon which the jury could find” guilt. Allen, 182 Wn.2d at 373-74. There is a substantial likelihood misconduct affected the jury where jurors could have relied on the improper argument in convicting - and even though the argument was “subtle,” because the improper argument could have let the jury to convict on less than sufficient evidence based on the misstatement of the law. State v. Shipp, 93 Wn.2d 510, 517, 610 P.3d 1322 (1980).

Notably, such misconduct is not “cured” just because the trial court gave the usual instruction that the lawyers’ remarks were “not evidence.” Allen, 182 Wn.2d at 379. The presumption that jurors follow instructions is overcome when there is evidence the jury was influenced by the improper statement. Allen, 182 Wn.2d at 380. Here, again, the improper arguments went to the crucial issues in the case, misstating the state’s burden and relieving the prosecutor of the full weight of proof the constitution requires her to bear.

In addition, the prosecutor committed flagrant, prejudicial misconduct in effectively drawing a negative inference from Teters exercising his constitutional rights to counsel and to trial. The prosecutor told jurors H “had to talk to defense counsel in a separate interview, where she was asked about what happened, and then she had to come in here, and

she had to tell all of you and all of us here, whoever's in the courtroom, about what happened to her.”

Further, the prosecutor improperly vouched for and bolstered H by clearly conveying a personal opinion as to H's veracity - and thus Teters' guilt. The prosecutor told jurors H “came here, and she told you all what happened,” that she came into the courtroom and told everyone there “about what happened to her” (RP 894), that although it “wasn't fun” for H she “still came, and she told you what happened, just like she told Dr. Meadows what happened the night that it did” (RP 893-94), that “[H] told you what happened to her” (RP 910), that “we” (the state) did not have to prove intent and “we know that he did. We know that he did these actions, because that's what all of the evidence shows us.” RP 909.

A prosecutor commits misconduct and gives an improper personal opinion when “it is clear and unmistakable” that she is not arguing an inference from facts but expressing a personal inference. State v. Papadopoulos, 34 Wn. App. 397, 400, 662 P.2d 59 (1983). While the last comment mentioned the evidence, up until that point, the prosecutor's statements were expressing an opinion about H, that she was telling jurors “what happened,” i.e., that she was raped.

Finally, this Court should hold that the “why would she make it up” arguments the prosecutor repeatedly made were flagrant, prejudicial misconduct. The prosecutor repeatedly

asked jurors why H would make up being abused if she was not, and whether it was “reasonable” that H would have “hallucinated” being abused. The clear implication was that jurors had to find a reason to doubt guilt.

Reversal is required. The only issue at trial was whether the jury would believe that Teters improperly touched H, based essentially on just her word. As the state Supreme Court has declared, “misconduct by the State is particularly egregious,” because the prosecutor’s status elevates the importance of their statements, so that “[t]he prosecuting attorney misstating the law of the case to the jury is a serious irregularity having the grave potential to mislead the jury.” State v. Davenport, 100 Wn.2d 757, 763, 675 P.2d 1213 (1984).

In determining whether misconduct compels reversal, the inquiry is not whether there is sufficient evidence to convict. See In re Glassman, 175 Wn.2d 696, 712-713, 286 P.3d 673 (2012). Indeed, in most cases where there is misconduct below, “competent evidence fully sustains a conviction.” 175 Wn.2d at 713 (emphasis in original). Thus it is not sufficiency but rather the question of whether there is a substantial likelihood that the misconduct affected the jury’s verdict, even absent objection below, where, as here, the misconduct is so flagrant it could not have been cured by instruction. 175 Wn.2d at 714. Given the nature of the case, the charges against Mr. Teters, the testimony and lack of supporting evidence and the serious issues raised by

the misconduct in this case, this Court should reverse and remand for a new trial, even if reversal and dismissal of counts 2 and 3 were not required.

4. APPELLANT WAS DEPRIVED OF A FULL, FAIR OPPORTUNITY TO PRESENT A DEFENSE

A new trial could also be ordered based upon the violations of Mr. Teters' rights to present a defense and to full and fair confrontation. The Sixth Amendment and Article 1, § 22, of the Washington Constitution guarantee the accused the right to confront and cross-examine the witnesses against him. Delaware v. Van Arsdall, 475 U.S. 673, 678, 106 S. Ct. 1431, 89 L. Ed. 2d 674 (1986); State v. Hudlow, 99 Wn.2d 1, 15-16, 659 P.2d 514 (1983). Any attempt to limit meaningful cross-examination must be justified by a compelling state interest. Hudlow, 99 Wn.2d at 15-16.

The defendant also has a due process right to present evidence which is relevant and material to his defense. See State v. Darden, 145 Wn.2d 612, 41 P.3d 1189 (2002). The threshold for proving evidence so "relevant" is "very low." 145 Wn.2d at 621. Indeed, "[e]ven minimally relevant evidence is admissible." Id. The state can try to exclude such evidence if it can show "a compelling interest to exclude prejudicial or inflammatory evidence." Id.

Discovery is an essential part of development of a defense strategy. Where the defendant is unable "to adequately prepare

his case[, that] skews the fairness of the entire system.” Barker v. Wingo, 407 U.S. 514, 532, 92 S. Ct. 2182, 33 L. Ed. 2d 101 (1972); State v. Gonzalez, 110 Wn.2d 738, 748, 757 P.2d 925 (1988). Due process requires not only effective assistance and the right to a fair trial, but also that counsel is allowed to conduct “reasonable investigation” into potential matters of defense. See Strickland, *supra*; State v. Boyd, 160 Wn.2d 424, 434, 158 P.3d 54 (2007).

These principles apply to discovery and mandate that, where the prosecution tries to prevent defense access to materials as “privileged” or “confidential,” the defendant is entitled to have the trial court conduct an in camera review of those documents. See CrR 4.7(h)(6); Pennsylvania v. Ritchie, 480 U.S. 39, 57, 107 S. Ct. 989, 94 L. Ed. 2d 40 (1987); State v. Mines, 35 Wn. App. 932, 938-39, 671 P.2d 273 (1983). Where, as here, the defense establishes a basis to believe records may have evidence relevant to the case, the trial court will conduct an in camera review to determine whether there is exculpatory or impeaching information. See State v. Cleppe, 96 Wn.2d 373, 382, 635 P.2d 435 (1981).

On review, this Court should reverse the trial court’s decision refusing to release the therapy and mental hospitalization records of the alleged victim below. Under CrR 4.7(a)(3), except as subject to a protective order, discovery in a criminal case is a mandatory obligation the prosecutor bears to

disclose any “material or information within the prosecuting attorney’s knowledge which tends to negate defendant’s guilt as to the offense charged.” Further, under CrR 4.7(c)(1), disclosure is permitted of any information, “[u]pon a showing of materiality to the preparation of the defense.”

This Court should review the files to determine whether the trial court erred in holding there was no possibly exculpatory information in them. See Mines, 35 Wn. App. at 938-39. The record of the in camera hearing “must be made available to the appellate court,” because this Court does not “act as a rubber stamp for the trial court’s in camera hearing process.” State v. Wolken, 103 Wn.2d 823, 829, 700 P.2d 319 (1985). This Court should conduct such review. And it should do so with full recognition that impeachment evidence is especially crucial in a case involving alleged sexual assault. See State v. Knutson, 121 Wn.2d 766, 775, 854 P.2d 617 (1993).

Notably, the trial court relied on the evidence it had reviewed in camera later, at sentencing, even though that evidence was excluded from the defense. In sentencing Mr. Teters, the trial court said:

What is an appropriate sentence for that conduct that you committed on this young lady? I also had - - different than you did and different than the attorneys did, I had an opportunity to do an in-camera review of some of the history for the child that is part of the record not available to you. And so I have some different perspective on how things worked out in this case than what even you guys do.

RP 977 (emphasis added). This Court should review the sealed exhibits and, on review, should determine whether the trial court erred in refusing to release the information to the defense as part of discovery.

5. IN THE ALTERNATIVE, IMPROPER AND UNCONSTITUTIONAL CONDITIONS OF COMMUNITY CUSTODY WERE IMPOSED AND SHOULD BE STRICKEN

Even if other relief is not granted, the Court should strike sentencing conditions 3, 6, 7 and 11, because none of them were authorized by statute and several were unconstitutional. Under the Sentencing Reform Act, a sentencing court's authority is limited and that court may not impose conditions of sentence unless they are authorized by statute. State v. Zimmer, 146 Wn. App. 405, 414, 190 P.2d 121 (2008), review denied, 165 Wn.2d 1035 (2009). An unauthorized condition of community custody is considered void and in excess of the court's authority. State v. Hale, 94 Wn. App. 46, 53, 971 P.3d 88 (1988). As such, it must be stricken. See State v. O'Cain, 144 Wn. App. 772, 775, 184 P.3d 1262 (2008). Further, a sentencing condition which impacts a fundamental constitutional right must meet stricter standards than an average condition. See State v. Bahl, 164 Wn.2d 739, 744-46, 193 P.3d 678 (2008).

In this case, conditions 3, 6, 7 and 11 do not withstand review. At the outset, these issues are properly before the Court. An illegal or erroneous condition of a sentence may be

raised for the first time on appeal. Bahl, 164 Wn.2d at 74-45. If a condition is challenged as not being authorized by statute and no further factual development is required, the Court will address it “preenforcement,” without waiting to see factually how the condition is applied. Id.; see State v. Jones, 118 Wn. App. 199, 204, 76 P.3d 258 (2003).

RCW 9.94A.703 provides for both mandatory and “waiveable” or “discretionary” conditions, which include ordering a person to 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.” RCW 9.94A.703. Further, RCW 9.94A.505 allows imposition of crime-related prohibitions. See In re the Personal Restraint of Rainey, 168 Wn.2d 367, 375, 229 P.3d 686 (2010).

The conditions here were not authorized by statute. None of them is listed in either statute. Thus, they are not authorized unless “crime-related.” A condition is only “crime-related” if it is an “order of the court prohibiting conduct that directly relates to the circumstances of the crime for which the offender has been convicted.” RCW 9.94A.030(10). While there need not be proof of a causal link, there must be sufficient evidence of a factual relationship between the crime and the condition. State v. Parramore, 53 Wn. App. 527, 531, 768 P.2d 530 (1989).

Here, the incident did not happen in a “business

establishment” or place “that cater[s] to minor children.” It did not involve controlled substances - indeed, the trial court was unconvinced that it even involved alcohol. It did not involve paraphernalia. It did not involve “sexually explicit material.” “Persons may be punished for their crimes and they may be prohibited from doing things which are directly related to their crimes, but they may not be coerced into doing things which are believed will rehabilitate them.” State v. Riley, 121 Wn.2d 22, 37, 846 P.2d 1365 (1993). A condition regarding drug paraphernalia is not “crime-related” when the state presents “no evidence or argument that drug use, or possession of drug paraphernalia, bore any relation to [the] offenses.” State v. Land, 172 Wn. App. 593, 605, 295 P.3d 782 (2013). And mere possession of drug paraphernalia is not a crime. State v. George, 146 Wn. App. 906, 918, 193 P.3d 693 (2008). It is also not unlawful for an adult to possess adult pornography - indeed, such pornography is protected speech. See Reno v. ACLU, 521 U.S. 844, 117 S. Ct. 2329, 138 L. Ed. 2 874 (1997). Absent any evidence those lawful activities were related to the crime for which the defendant was convicted in some way, condition 7 and 6 (to the extent it requires testing for legal controlled substances), as well as 3 and 11 cannot stand.

Further, conditions 3 and 11 are both unconstitutionally vague and violate the First Amendment. This Court no longer applies a “presumption of constitutionality” for sentencing

conditions. See State v. Sanchez Valencia, 169 Wn.2d 782, 792-93, 239 P.3d 1059 (2010). Under state and federal due process, a defendant is entitled to fair notice and warning of what conduct he must avoid. Bahl, 164 Wn.2d at 752. A condition must provide sufficient notice and include sufficient standards to protect against arbitrary enforcement. Id.; see State v. Sansone, 127 Wn. App. 630, 638, 111 P.3d 1251 (2005).

In addition, a person convicted of a crime is not divested of all First Amendment rights. See Bahl, 164 Wn.2d at 756-57. Where a condition affects materials or actions protected under the First Amendment, a stricter standard of definiteness is required. Id. A restriction on a fundamental right is only proper if “reasonably necessary to accomplish essential needs of the state and public order.” Bahl, 164 Wn.2d at 757-58.

Conditions 3 and 11 failed under both due process and First Amendment standards. Condition 3, the prohibition on “frequenting” or entering “business establishments or locations that cater to minor children or locations where minors are known to congregate” is unconstitutionally vague. There is no question that a person on community placement is subject to infringements on their rights such as the right to movement or freedom of association. See In re Personal Restraint of Waggy, 111 Wn. App. 511, 517, 45 P.3d 1103 (2002). But this condition is extremely broad - it even states that its list of examples is not exhaustive. And it covers “any areas routinely used by minors

as areas of play/recreation.” Does that include going for a walk down a street where children play a pick-up game once a week? Does it include a library, a place many people find essential to access the Internet - access the U.S. Supreme Court has recently declared fundamental to the First Amendment. Packingham v. North Carolina, 582 U.S. __, __ L. Ed. 3d __, 137 S. Ct. 1730 (No. 15-1194) (June 19, 2017).

Nothing in the record showed the need for this restriction was “reasonably necessary to accomplish essential needs of the state and public order.” Bahl, 164 Wn.2d at 757-58. Nor was there such proof for condition 11, which prohibits viewing or possessing “sexually explicit material as defined in RCW 9.68.130(2) without prior approval.” CP 392.

E. CONCLUSION

For the reasons stated herein, this Court should grant appellant relief.

DATED this 17th day of August, 2017.

Respectfully submitted,

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DATED this 17th day of August, 2017.

Respectfully submitted,

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