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Grays Harbor County No. 16-1-110-9

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

STATE OF WASHINGTON,

Respondent,

v.

JOEL M. KREBS,

Appellant.

ON APPEAL FROM THE
SUPERIOR COURT OF THE STATE OF WASHINGTON,
GRAYS HARBOR COUNTY

The Honorable Stephen Brown, Trial Judge

APPELLANT'S OPENING BRIEF
AMENDED PER COURT ORDER

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A. ASSIGNMENTS OF ERROR

1. The prosecution failed to prove all the essential elements of second-degree rape and the resulting conviction violates due process under Article 1, § 3, and the 14th Amendment.
2. The prosecutor committed serious, prejudicial misconduct by repeatedly misstating crucial evidence and denigrating defense counsel.
3. The state's witnesses gave explicit or nearly explicit improper opinion testimony on the credibility, veracity and guilt and the prosecution cannot prove the constitutional error harmless, beyond a reasonable doubt.
4. Appellant Joel Krebs was deprived of his state and federal due process rights to present a defense when the trial court excluded evidence which was relevant and material to the defense.
5. Improper, irrelevant and prejudicial evidence was admitted over defense objection.
6. The cumulative effect of the trial errors deprived appellant Joel Krebs of his state and federal due process rights to a fundamentally fair trial.
7. Counsel was ineffective in failing to argue for an exceptional sentence below the standard range under State v. O'Dell, 183 Wn.2d 680, 358 P.3d 359 (2015), as it applied Miller v. Alabama, 542 U.S. ___, 132 S. Ct. 2455, 18 L. Ed. 3d 407 (2012).
8. The following conditions of community custody set forth in the judgment and sentence were not statutorily authorized and further run afoul of fundamental constitutional rights:
 - The defendant shall not possess or consume controlled substances nor possess drug paraphernalia without a valid prescription with random urinalysis testing to ensure compliance;
 - The Defendant shall complete a substance abuse evaluation by a state certified agency within 45 days of release and successfully complete any recommended treatment and follow up[.]

CP 189. The following additional conditions are also unauthorized:

- [x] Complete *substance abuse* evaluation by a state certified agency within 45 days of release and successfully complete any recommended treatment;
- [x] Not possess or consume controlled substances, nor possess drug paraphernalia without a valid prescription;
- [x] The defendant shall:
 - [x] Not consume or possess any controlled substance or drug paraphernalia without a valid prescription;
 - ...
 - [x] Submit to random urine/breath testing to monitor alcohol/drug-free status as requested by his/her CCO;

CP 192.

9. The proposed conditions from the Department of Corrections (DOC) were not reduced to writing and thus are not part of the sentence. In the alternative, to the extent the lower court adopted them, appellant assigns error to the following proposed findings as not statutorily authorized and/or violating fundamental constitutional rights:
 - (18) Submit to polygraph and plethysmograph examinations as directed by the CCO
 - (19) Do not possess or pursue [sic] any sexually explicit material.
 - (20) Do not enter x-rated movies, peep shows, or adult book stores.
 - (21) Do not purchase, possess, or use any illegal controlled substance, or drug paraphernalia, without the written prescription of a licensed physician.
 - ...
 - (24) Do not enter any business where alcohol is the primary commodity for sale.
 - ...
 - (27) Do not loiter or frequent places where children congregate; including shopping malls, schools, playgrounds and video arcades.

CP 162.

10. Articles 1, §§ 10 and 22, GR 15 and the presumption of open, public criminal proceedings were violated when the sentencing court sealed two orders without doing the required analysis under State v. Boneclub, 128 Wn.2d 254,

906 P.2d 325 (1995).

B. QUESTIONS PRESENTED

1. As charged, second-degree rape requires proof that the alleged victim was incapable of consent at the time of the intercourse, due to “mental incapacity” or being “physically helpless.” A person is “physically helpless” for this purpose if they are unable to communicate in any way, and suffers “mental incapacity” if they suffer a medical condition or are so drunk that they cannot comprehend the consequences of sex, so that even if they say “yes,” that is not dispositive.

Did the state fail to prove the alleged victim was unable to communicate her lack of consent when she testified that she repeatedly said “no,” screamed, told him it hurt and otherwise verbally objected, thus showing ability to communicate and awareness of potential consequences?

2. Did the prosecutor commit flagrant, prejudicial misconduct in repeatedly misstating crucial evidence and telling the jury that they should convict because the victim was unconscious when intercourse began, even though the victim testified to the contrary? Further, did the prosecutor commit flagrant, prejudicial misconduct in denigrating counsel?
3. Did officers give improper opinion testimony in repeatedly indicating their belief that a rape had occurred?
4. Did the trial court err and were appellant’s rights to present a defense violated when he was precluded from impeaching the complainant on her claims about experience with drinking, even though intoxication was an important issue in the case?
5. The complainant’s blood tested negative for all known drugs. Did the trial court abuse its discretion in allowing her to speculate about whether she might have been drugged and allowing in evidence on that issue despite the complete lack of evidence and even though that evidence was highly prejudicial?
6. Did the cumulative weight of the errors deprive Mr. Krebs of a fair trial?
7. Where the defendant was just 18 at the time of the crime,

was counsel prejudicially ineffective in failing to argue for an exceptional sentence below the standard range due to the mitigating factors of youth under Miller and O'Dell?

8. Are conditions of community custody improper where they were not authorized by statute and several run afoul of constitutional mandates?
9. Where the sentencing court orally mentions an intent to enter certain conditions of community custody but those conditions are not included in the judgment and sentence, does the written judgment and sentence control?
10. In the alternative, are the proposed DOC conditions improper and should they be stricken to the extent the trial court entered them, because the conditions were not authorized by statute and several run afoul of important constitutional rights?
11. Are the presumptions of open justice violated when a trial court enters an order to seal without conducting a Bone-Club analysis on the record?

C. STATEMENT OF THE CASE

1. Procedural Facts

Appellant Joel M. Krebs was charged in Grays Harbor County by information with one count of second-degree rape. CP 1-2; RCW 9A.44.050(1)(b). Pretrial and trial proceedings were held before the Honorable Judges F. Mark McCauley and Stephen Brown on March 8 and 28, April 11 and 25, with trial before Judge Brown on July 26 and 27, 2016.¹ On September 9, 2016, Judge Brown denied a motion to arrest judgment and ordered a standard-range indeterminate sentence. CP 183-

¹The verbatim report of proceedings consists of four volumes, which will be referred to as follows:
the volume containing the proceedings of March 8 and 28, April 11 and 25, July 26 and 27, 2016, as "1RP;"
July 11 and 25 and September 9, 2016, as "2RP;"
voir dire and opening statement of July 26, 2016, as "3RP;"
the bail hearing of October 3, 2016, as "4RP."

97. Mr. Krebs appealed and this pleading follows. See CP 198-99.

2. Testimony at trial

S.C. and Joel Krebs had sex one night after they played “strip beer pong” and drank together with Tanner Birdsall at Birdsall’s home. Krebs would later be charged with second-degree rape for that incident.

S.C. and Krebs had starting dating when they were in high school. 1RP 39. She was older, in her junior year. 1RP 39. They dated a long time, at one point living together in a trailer on her family’s property. 1RP 39-40, 75-76. She moved out and apparently broke up with him two days after she graduated high school, leaving to go live in a bigger town. 1RP 39-40.

On February 9, 2016, S.C. sent out a general “SnapChat” notice she was returning to visit that weekend. 1RP 42. She and Krebs were still friends and Krebs was dating someone else. 1RP 42. He seemed pretty happy in that relationship and S.C. did not get the sense that Krebs wanted to get back together with her - nor was she interested, herself. 1RP 42-43.

They arranged for S.C. to meet Krebs and Birdsall at a local convenience store about 8 p.m., so she could follow them to Birdsall’s home. 1RP 44. S.C. had not told her mom that she was in town and was planning to spend the night at Birdsall’s house. 1RP 74. When they got there house, he gave her a tour, after which they all sat around talking. 1RP 45.

S.C. knew before the tour - indeed, before that night - that the home was a one-bedroom. 1RP 74. At trial, she said she had not planned to drink but they actually had some of “the only thing” she drank, a type

of hard lemonade called “Mike’s.” 1RP 45-47. The boys were drinking beer and seemed to have been playing a game of “beer pong,” which involves throwing a ball into cups and drinking at certain points. 1RP 47-48.

S.C. said she had not played “beer pong” before with alcohol, only water. 1RP 49. She also said she had hardly ever consumed alcohol, and had only really gotten drunk once or twice before. 1RP 37, 67, 73. She further said she was never really “a big drinker,” drank “little to none,” did not like the taste of alcohol, was a “lightweight,” was affected “pretty heavily” by alcohol and really only drank “hard lemonade.” 1RP 38-40.² On cross-examination, she admitted getting drunk with someone named Gavin Jasper but said that was one of the only one or two times, total. 1RP 73.

At some point, they shifted to playing a “strip” version of the game. 1RP 50. At trial, S.C. first said she did not really remember agreeing, but ultimately she did, noting she had limited it by saying she would not take off her underwear, because it would be “weird.” 1RP 50-51, 75. She made the same admission to police in her statement, as well. 1RP 75.

That night, she thought, she had three or four bottles of the “hard” lemonade close together. 1RP 49. She got “a little bit fuzzy,” and was, she said, “falling down a lot.” 1RP 49, 74. She recalled getting up at one point to go to the bathroom and stumbling a little, Krebs had caught her.

²The court’s refusal to allow impeachment and rebuttal of this claim is discussed in more detail, *infra*.

1RP 49. They continued to play the game, she said, laughing at her for “falling a lot.” 1RP 49-50.

But S.C. also testified that, right after she stumbled, Krebs picked her up, carrying her into the bedroom. 1RP 50. She said both young men then laid on either side of her, just talking with her at first. 1RP 50. She did not remember what exactly was said, but at some point, they started to “do things,” touching different parts of her body and kissing her neck. 1RP 51. She asked what they were doing and tried to protest but they reassured her, saying, “shhh, it’s fine.” 1RP 51-52. She also said she was trying to say “no” and tell them she did not want this to happen, but felt “there was just nothing [she] could do.” 1RP 52. At some point, one of them took her underwear off. 1RP 52.

S.C. testified that she felt like she could “barely” keep her eyes open, “couldn’t really move all that well,” and was “kind of like paralyzed almost.” 1RP 52. She said Birdsall then forced his penis into her vagina. 1RP 53. S.C. laid there because she “couldn’t really move or go anywhere.” 1RP 54. She was really scared, wanting to leave and feeling she could not really do anything, but also “really confused from the alcohol.” 1RP 55. When asked by the prosecutor whether she was “physically unable to leave,” S.C. said she could not move. 1RP 55-56.

During this time, S.C. thought that Krebs was trying to put his penis in her mouth “and other places.” 1RP 53. She thought he got it in her mouth and said something like, “[w]e will be bros now.” 1RP 54. After a few moments, Birdsall said he could not “finish” with Krebs in the room and Krebs walked out. 1RP 54. Although she initially denied it at

trial, S.C. had previously said that Krebs had actually asked her and Birdsall at that point if they wanted Krebs to leave. 1RP 76-77.

According to S.C., once Birdsall had finished, Krebs came back into the room and put his penis in her vagina. 1RP 54-55. It was very painful and S.C. screamed. 1RP 54-55. Krebs seemed to her to be “very violently angry.” 1RP 54-55. After she had screamed, she said, she started crying and “asking him to stop and then saying it was hurting. 1RP 55. Despite her pleas, “he just kept going.” 1RP 55.

At trial, S.C. would testify that Krebs pulled his penis out and ejaculated on her face, then wiped it off with a towel or shirt. 1RP 56. She did not, however, mention this to the officers who took her eight page sworn statement detailing the incident a few days after it occurred. 1RP 134-35. Nor did she report it a day or so after that, when she was taken to the hospital for the physical and was asked if anyone had ejaculated. 1RP 140. She answered that she did not know. 1RP 140.

Krebs left and she went “unconscious,” waking up a little later naked. 1RP 56. She went to go to the living room but described “falling down through the doorway and crawling to the living room” to try to find one of the young men or her clothes. 1RP 56. She was crying and remembered Birdsall coming over to ask if she was okay. 1RP 56. He got her inhaler and brought it to her, then was helping her with her clothes but she passed out. 1RP 56. She woke up in the bedroom again, this time wearing her clothes. 1RP 56.

When she next woke about 2 a.m., S.C. felt the “effects of the alcohol had finally kind of left.” She went into the living room where both

young men were sleeping and woke up Birdsall. 1RP 57. She told him she did not really remember what had happened earlier, got some water and he sent her back to bed, where she fell asleep. 1RP 57-58. She was next awakened by Birdsall and Krebs at about 8 in the morning. 1RP 58.

S.C. noticed pain in her vaginal area, inside and a little outside, “like a burning feeling.” 1RP 58. She testified that she then asked them “repeatedly if anything had happened sexually between us.” 1RP 58. When they said it had not, she took their word for it. 1RP 58. She said they were “really calm,” told her that she had fallen on a couch and “totally crotched it.” 1RP 58-59. She also testified that she thought Krebs had at one point asked if she remembered the night before, telling her she had been really drunk and falling over. 1RP 60.

But S.C. also said that she did not “really remember” what they said to her that morning - or who said what. 1RP 59-60. She was “still pretty fuzzy” when she woke and felt rushed out of the house. 1RP 59-60.

S.C. went to her mom’s house and laid down. 1RP 61. She planned to go to sleep but “got really sick really fast” and vomited “for a number of hours after.” 1RP 61. At some point, she said, Krebs had called to see if she was okay and needed anything. 1RP 62-63. She would testify at trial that she repeatedly asked him in that conversation if anything sexual had happened but he said no. 1RP 63. At about noon, S.C. went back to sleep but was having what she said were “nightmare flashes.” 1RP 61. She started to panic a little, so she called her mom, said she was hurting “down there,” and asked her mom to come home as soon as possible. 1RP 62.

S.C.'s mom, Sarah Cavanaugh-Leithold, admitted to having "some memory issues sometimes" but remembered her daughter was in the bathroom "sick, shaking," like "a really bad hangover." 1RP 84. At some point, she started asking if S.C. had sex the night before but her daughter demurred. 1RP 85.

Cavanaugh-Leithold then started trying to contact Krebs, sending him some texts and, when he did not immediately respond, going onto Facebook social media website, sending him a "friend" request. 1RP 85-86. When he accepted it, she sent him a "message" back, asking him how much her daughter had to drink the night before. 1RP 85-86. Krebs responded, "quite a bit" and that he had "tried to cut her off after two." 1RP 85-86. Krebs asked if there was anything he could do and she suggested bringing by "saltines." 1RP 85.

Cavanaugh-Leithold suggested going to the hospital, where a "SANE" trained nurse did a "kit," taking blood and urine and suggesting antibiotics 1RP 64-65. At trial, S.C. would relate how difficult it was to go through the exam, saying it was "very personally invading," both in "space and privacy, being poked and prodded at like that." 1RP 65. She also said the antibiotics were painful and it was "very rough" to have to give a statement saying what she remembered. 1RP 65.

S.C. has a body hair "phobia," so does not have pubic hair. 1RP 65. A pubic hair was found in the exam. 1RP 65. Police then set up a "confrontation call," planning to have S.C. call Birdsall and Krebs to try to get them to tell her "the truth" or change what they had previously said. 1RP 68. Krebs returned her call, seemed calm and told her nothing had

happened but if it had it was with Birdsall and she needed to talk to him. 1RP 69. He also told her she had fallen on a stool. 1RP 171-72.

Grays Harbor County Sheriff's (GHCS) patrol deputy Jason Wecker went to take S.C.'s statement of "what she remembered," and was present for the "confrontation" call. 1RP 122-23. A tape of that call was played, in which Krebs repeatedly denied having sex with S.C. 1RP 116. Shortly after that, GHCS patrol deputy Steve Beck arrested Krebs and Birdsall. 1RP 95. Beck testified that, when Krebs was arrested, he asked if it was about S.C. and told the deputy, "I was in the other room." 1RP 95-96.

Wecker testified about interrogating Krebs, noting that Krebs first denied that anything happened but, after being confronted that the officers "knew more than we had let on originally," he ended up stating that both he and Birdsall had sex with S.C. that night. 1RP 127. On cross-examination, Wecker admitted that actually Krebs had admitted to the sex only after an officer had suggested that Krebs was just "embarrassed because he was involved in a threesome" and "did not want everyone to know that they had sex with a really drunk girl." 1RP 131. The officer also said it was "understandable," several times. 1RP 131-32. He noted that Krebs started to "tear up a little bit," was "shaking his head in agreement" said yes, "he wanted to tell us the truth," then disclosed having sex with S.C. that night but saying it was consensual. 1RP 128-133.

Lisa Curt conducted a physical exam on S.C. and related what S.C. told her had happened, including that she drank more than usual, remembers stumbling to the bathroom, getting carried to the bedroom and

passing out. 1RP 145-46. Curt said S.C. reported that she “came to” off and on, and recalled crying and screaming and telling him to stop because it hurt. 1RP 146. In the exam, Curt found redness, swelling and irritation of the vaginal area. 1RP 146-47. Her report indicated it was “slight.” 1RP 149.

Krebs, who was 18 at the time of trial, admitted to being untruthful with S.C. and the police at first. 1RP 152-55. He explained he was dating someone else he loved and really did not want to break her heart by having committed adultery. 1RP 155.

Krebs said that, when he invited S.C. to go to Birdsall’s and hang out with them, he told her they would be drinking and asked if she still drank hard lemonade. 1RP 157. She said yes and asked if they would pick some up for her, saying she had no money. 1RP 157. After she followed them to Birdsall’s, they showed her around and then all started drinking. 1RP 157-58. S.C. got involved in a beer pong game they had going and they played for several hours. 1RP 159.

Krebs said it was a joint decision to play strip beer pong. 1RP 160. They had not done anything like that before. 1RP 160. S.C. was up for it, too, but said she was not going to take off her bra and underwear. 1RP 160. Krebs and Birdsall had to take something off whenever they missed a cup but S.C. got three or four misses before she had to take anything off. 1RP 161.

They all started with one sock and, by the end, the boys were in their “boxer” underwear and S.C. had no bra on and was just in her underwear. 1RP 161. Indeed, when she took her bra off, Krebs said, she

raised her hands in the air and told the boys to come and feel her breasts. 1RP 161. Krebs conceded that, “being guys, we did.” 1RP 161. He did not mention that detail in his statement to police, but thought it was because his initial statement was a denial and he did not fill in details once he finally admitted having sex. 1RP 165.

Towards the end of the game S.C. went to the bathroom and had fallen down, so Krebs picked her up, put her in bed and gave her a “puke bucket and some water.” 1RP 162. He asked if she needed anything else and she said, “no.” 1RP 162. He then went back out to play normal beer pong with Birdsall again. 1RP 162. They had put their shirts on when S.C. came back out and said she wanted to keep playing. 1RP 162.

At that point, Krebs said, S.C. started flirting. 1RP 162. She was kissing them, rubbing their backs, giggling, saying things like she hadn’t had sex in a long time. 1RP 163. Krebs himself was intoxicated and knew his decision making was probably not the best, but knew what was going on and thought she seemed to want more. 1RP 164.

When they were in the bedroom, Krebs said, they were kissing her and she was kissing them back. 1RP 164. Birdsall had taken off her underwear and she had not said “stop,” “no,” or anything similar. 1RP 165. She seemed willing, Krebs thought, and was “making the noises that a woman who’s enjoying herself would make.” 1RP 165.

Krebs testified that, while Birdsall was having sex with S.C., he asked her if he was better than “Jacob,” someone they knew. 1RP 166. The conversation they had made Krebs believe she knew what was going on. 1RP 166. When he and S.C. were having sex, she was kissing him

and had her hands on his back just like when they had sex while dating. 1RP 166. Krebs did not ejaculate, he said, because he was kind of self-conscious with his friend in the room. 1RP 166.

Krebs said S.C. did not start crying during sex but rather later, when they were sitting on the bed and their “old” song came on. 1RP 167. They turned up the music and she started crying, talking about their relationship and saying she still loved him. 1RP 167. Krebs was clear at trial that if he had any doubt that she was a willing participant he would not have had sex with her. 1RP 168.

D. ARGUMENT

1. THE STATE FAILED TO PRESENT SUFFICIENT EVIDENCE TO PROVE ALL THE ESSENTIAL ELEMENTS OF SECOND-DEGREE RAPE

Both Article 1, § 3, and the Fourteenth Amendment to the federal constitution guarantee the accused in a criminal case the due process right to be free from conviction upon anything less than proof of every element of the charged crime, beyond a reasonable doubt. See State v. Baeza, 100 Wn.2d 487, 488, 670 P.2d 646 (1983); In re Winship, 397 U.S. 358, 364, 90 S. Ct. 106, 25 L. Ed. 2d 368 (1970). Where the state fails to meet this burden of proof, reversal and dismissal is required. See State v. Green, 94 Wn.2d 216, 220, 616 P.2d 628 (1980), overruled on other grounds by, Washington v. Recuenco, 548 U.S. 212, 126 S. Ct. 2546, 165 L. Ed. 2d 466 (2006); see also, Jackson v. Virginia, 443 U.S. 307, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979). In this case, reversal and dismissal is required, because the state failed to prove all the essential elements of second-degree rape, beyond a reasonable doubt.

Evidence is constitutionally sufficient to support a conviction if, after viewing it “in a light most favorable to the State, any rational trier of fact could have found the essential elements of the charged crime, beyond a reasonable doubt.” State v. Ortega-Martinez, 124 Wn.2d 702, 708, 881 P.2d 231 (1994). Sufficient evidence is evidence “adequate to justify a rational trier of fact to find guilt beyond a reasonable doubt.” Green, 94 wn.2d at 220.

Here, there was not sufficient evidence to prove second-degree rape. The charge was second-degree rape committed while the victim was “incapable of consent.” CP 1-2. That crime is defined in RCW 9A.44.050(1)(b) as follows:

A person is guilty of rape in the second degree when, under circumstances not constituting rape in the first degree, the person engages in sexual intercourse with another person:

When the victim is incapable of consent by reason of being physically helpless or mentally incapacitated.

RCW 9A.44.050(1)(b).

“Mental incapacity” and being “physically helpless” are further defined. See, e.g., State v. Puapuaga, 54 Wn. App. 857, 860, 776 P.2d 170 (1989). Under RCW 9A.44.010(4), “[m]ental incapacity” is defined as “that condition existing at the time of the offense which prevents a person from understanding the nature or consequences of the act of sexual intercourse whether that condition is produced by illness, defect, the influence of a substance or from some other cause.” RCW 9A.44.010(5) defines a person as being “[p]hysically helpless” when she “is unconscious or for any other reason is physically unable to communicate

and unwillingness to an act.”

Being “physically helpless” or “mentally incapable” of consent are not “alternative means,” but simply different factual scenarios showing that the alleged victim was not in a position to express either consent or lack thereof. State v. Al-Hamdani, 109 Wn. App. 599, 36 P.3d 1103 (2001), review denied, 148 Wn.2d 1004 (2003). A person is unable to consent because of being “physically helpless” when they are physically incapable of conveying consent by any means of communication, i.e., are asleep or unconscious.. See State v. Bucknell, 144 Wn. App. 524, 183 P.3d 1078 (2008). A person is incapable of consent by reason of mental incapacity when they are not able to “understand the nature or consequences of the act of intercourse” at the time it occurred. Ortega-Martinez, 124 Wn.2d at 707-708.

Thus, where a victim was 30 years old but had an IQ in the 40s, was in assisted living and unable to live alone because of an inability to resist the instructions of others, the defendant was guilty of second-degree rape despite the victim’s general compliance with his demands that they engage in sex in his truck. 124 Wn.2d at 706. She had an extremely limited understanding of the “nature and consequences of sexual intercourse” and at trial “exhibited the skills of a child,” giving answers which were “often nonresponsive.” 124 Wn.2d at 716. Her caseworker also testified that she did not retain an understanding of the harm of talking to strangers, or how to call for help. Id. The Court found that, taking the evidence in light most favorable to the state, a rational trier of fact could have found that the victim “had a condition which prevented her

from meaningfully understanding the nature or consequences” of having sex with the defendant, a total stranger who met her at a bus stop. Id. She was therefore “incapable of consent by reason of mental incapacity.” Id.

In contrast, the state failed to prove second-degree rape based on inability to consent where the alleged victim was paralyzed and unable to move from the neck down but maintained mental acuity and could speak. Bucknell, 144 Wn. App. at 526, 529. As a matter of law, the Court concluded, a victim “with physical limitations but capable of communicating unwillingness” was not “unable to consent” by reason of “physically helpless” under RCW 9A.44.050(1)(b). Bucknell, 144 Wn. App. at 528-29. The focus of the question of being incapable of consent is whether the victim has an inability or lack of opportunity to communicate. Puapuaga, 54 Wn. App. at 860 (victim who was asleep when defendant had sex with her was “physically helpless” for sex crime; being sound asleep is recognized as a time one is unable to “communicate unwillingness”).

In this case, there is no question that S.C. described having physical limitations. She said there were points where she “couldn’t really move all that well,” felt like she could “barely” keep her eyes open and felt “kind of like paralyzed almost.” 1RP 52. When Birdsall was having sex with her she described feeling like she “couldn’t really move or go anywhere.” 1RP 54. But her own testimony established that, with Krebs, she did not have an “inability to communicate.” 1RP 54-55. She described him coming into the room and putting his penis in her vagina. 1RP 54-55, 76-77. She said it was very painful. 1RP 54-55. She said he

seemed “very violently angry about it.” 1RP 54-55.

And during all of this time, she said, she “screamed and was crying and asking him to stop and then saying it was hurting.” 1RP 54-55.

Taken in the light most favorable to the state, this evidence fails to establish that S.C. was “unable to consent” as that term is defined for purposes of proving second-degree rape, as charged. Plainly, one is “**capable** of communicating unwillingness” if one actually **does so**. Based on her own version of events, S.C. repeatedly communicated unwillingness - screaming, saying it hurt, asking him to stop, etc. 1RP 54-55. There was insufficient evidence to prove all the essential elements of the charged crime, and this Court should so hold.

In dismissing counsel’s arguments on this point below at half-time, at the close to the defense case and the motion to set aside the verdict, the court relied on Al-Hamdani, *supra*, as controlling. *See, e.g.*, 1RP 150.

But that case does not control. In Al-Hamdani, the defendant argued that his right to unanimity was violated, because the “unable to consent” means of committing second-degree rape was divided further into two separate means: one showing inability based on physical helplessness and the other based on “mental incapacity.” 109 Wn. App. at 607-608. The defendant did not dispute that the state had provided sufficient evidence the victim was “physically helpless” when the defendant had sex with her while she was drunk and asleep. 109 Wn. App. at 608. He challenged only whether there was sufficient evidence to prove what he claimed was the “alternative means” of inability to consent due to “mental incapacity.” 109 Wn. App. at 608.

Further, in Al-Hamdani, the facts were markedly different. In that case, the victim awoke and the defendant was on top of her, asking her to perform oral sex, which she refused. Id. She was unaware they had already had vaginal intercourse until a physical exam the next day. 109 Wn. App. at 602. Unlike here, there was no testimony from the alleged victim in Al-Hamdani that she remembered the intercourse. Id. The victim in that case never said she felt him pushing his penis in, as S.C. said about Krebs. And she never testified, as S.C. did here, that she told him to stop, told him it was hurting and screamed and cried throughout. Indeed, in Al-Hamdani, the alleged victim never remembered the intercourse.

In addition, in Al-Hamdani, the defendant agreed that the alleged victim was unconscious during part of the sexual intercourse, but argued that the fact she was later able to say “no” to oral sex proved she likely had said “yes” to vaginal sex, but just forgotten. 109 Wn. App. at 608. There was testimony, however, that someone as intoxicated as the alleged victim - (BAC about .21) - would not have been capable of understanding the consequences of having sex. Taking the evidence in the light most favorable to the state, the Al-Hamdani Court found that a rational trier of fact could have found the victim was incapable of consent for the intercourse despite later saying no to oral sex, because of being so intoxicated at the relevant time. 109 Wn. App. at 608.

Notably, the ruling in Al-Hamdani was *dicta*, because the defendant conceded that there was sufficient evidence to prove the alleged victim was physically helpless at the time the intercourse occurred. 109 Wn. App. at 608. Thus, the discussion of whether she was also incapable

of consent due to mental incapacity was not necessary to uphold the conviction.

It is also worth noting that, under RCW 9A.44.060(1)(a), third-degree rape includes intercourse with a victim who did not consent and whose lack of consent was “clearly expressed by the victim’s words or conduct.” State v. Mares, 190 Wn. App. 343, 346, 361 P. 3d 158 (2015). The crime does not criminalize sexual intercourse where the perpetrator reasonably - but mistakenly - believed the victim was a “willing participant.” Mares, 190 Wn. App. at 353. Where, however, there is a lack of consent clearly expressed by words or conduct, the defendant’s claim of “misunderstanding” is considered “unreasonable” in most cases. See State v. Higgins, 168 Wn. App. 845, 854, 278 P.3d 693 (2012), review denied, 176 Wn.2d 1012 (2013). The conduct here was far closer to third-degree rape. The state failed to present sufficient evidence to prove the essential elements of second-degree rape as charged. Reversal and dismissal is required.

2. THE PROSECUTOR COMMITTED SERIOUS,
PREJUDICIAL MISCONDUCT WHICH COMPELS
REVERSAL

Reversal is also required based on the very significant, serious and prejudicial misconduct committed by the trial prosecutor in this case. Unlike defense or private counsel, a prosecutor is a quasi-judicial officer, endowed with the public’s trust and confidence. 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). As such, she has a duty 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). The prosecutor’s duty is not just to the public or the victim but the accused as well, and the prosecutor must seek a conviction based upon the evidence and the law. Monday 171 Wn.2d at 676-77.

In this case, the prosecutor failed in her duties. First, she committed serious, flagrant, ill-intentioned and prejudicial misconduct by repeatedly misstating crucial evidence and relying on it to prove guilt. Second, she committed misconduct by denigrating defense counsel and implying that counsel is lying or deceiving the court. It is misconduct to misstate the evidence presented, especially where arguing facts *not* in evidence is done to support the state’s case. State v. Reeder, 46 Wn.2d 888, 892, 285 P.2d 884 (1955); see State v. Grover, 55 Wn. App. 923, 926, 780 P.2d 901 (1989), review denied, 114 Wn.2d 1008 (1980). It is also misconduct to denigrate counsel and suggest he is acting in a dishonorable way. See State v. Gonzalez, 111 Wn. App. 276, 282, 45 P.3d 205 (2002), review denied, 148 Wn.2d 1012 (2003). Such comments “improperly encourage the jury to focus on the conduct and role of the attorney rather than evidence of guilt,” and have “no place” in trial. United States v. Holmes, 413 F.3d 770, 775 (8th Cir. 2005).

Here, the prosecutor wove both types of misconduct into one. First, she prosecutor repeatedly told the jury that S.C. had testified that she was unconscious when Krebs (and Birdsall, for that matter) started having

sex with her. Indeed, it was this “fact” upon which the state’s entire theory of guilt relied. During closing, the prosecutor declaimed that S.C. had testified that, during the incident, she was “in and out of consciousness.” 1RP 196-97. The prosecutor also told the jurors that S.C. testified about “coming to when the defendant was on top of her and inside of her,” and said, “she wasn’t conscious when it started.” 1RP 197.

In rebuttal closing argument, the prosecutor told the jury that the defense belief was that it was “somehow the victim’s fault” and “because you’re young and drinking you can do whatever you want.” 1RP 215. The prosecutor also said the defense counsel was “trying to direct” jurors away from that “she was unconscious when it started.” 1RP 215-16. The prosecutor went on, “[i]t doesn’t matter if she woke up after it started and said no, because that’s what he’s trying to get you to focus on. The consent has to happen when the act starts.” 1RP 216.

The prosecutor then repeated the accusation that counsel wanted the jury to focus on something other than that “she woke up after it started.” 1RP 216. The prosecutor also told the jury that it was not reasonable to believe that someone was capable of giving consent if “a person is unconscious when you start to have sex with them.” 1RP 217.

But S.C.’s testimony belies these claims. When asked about being on the bed and being touched, she said she could not really move “all that well” and could barely keep her eyes open. 1RP 52-53. But she then

remembered Birdsall starting to have sex with her. 1RP 53.³

And while she was not “sure” whether Krebs left the room during that time, S.C. was clear at trial that she recalled Birdsall “finishing” and Krebs then coming back and commencing sex with her. 1RP 54-55. She detailed how it felt. 1RP 55. She described how he appeared, saying he was “very violently angry about it.” 1RP 55. She also described her condition at the time and what she did, saying she “screamed and was crying and asking him to stop and saying it was hurting me[.]” 1RP 55. But, she recalled, he “kept going.” 1RP 55.

S.C. did not testify that she was unconscious when the sex with Krebs commenced. 1RP 52-56. She did not testify that she was “in and out of consciousness” or that she was unconscious and “woke up” to find Krebs having sex with her, as the prosecutor here averred. In contrast, she testified about what happened with Birdsall just before and the entire incident of intercourse with Krebs, from start to finish. The prosecutor repeatedly misstated these crucial facts in closing and rebuttal closing argument.

The extreme potential impact and prejudice from this repeated misstatement of crucial facts cannot be overstated. The only issue at trial was whether the prosecution proved the essential element of second-degree rape that S.C. was unable to consent because she was physically helpless or mentally incapable. The very definition given to jurors said

³After describing Birdsall putting his penis in her vagina, S.C. then described laying there, conscious but not really able to move, hoping it would be over, and said that, at one point, Krebs put his penis in her mouth and said something to Birdsall. 1RP 53. She also recited what she remembered Birdsall saying about not being able to “finish” with Krebs in the room. 1RP 53.

that standard is met if the state shows that the victim was unconscious.

In addition, the prosecutor's arguments about counsel trying to distract jurors from the evidence or suggesting counsel was somehow being dishonest was also misconduct. Thus, in State v. Warren, 165 Wn.2d 17, 195 P.3d 940 (2008), cert. denied, 129 S. Ct. 2007 (2009), the Supreme Court found the prosecutor had committed misconduct in declaring that there were a number of "mischaracterizations" in counsel's arguments and that the defense attorney's arguments were a "classic example" of twisting facts and hoping jurors would not figure it out. 165 Wn.2d at 30. Similarly, it is improper to declare the defense "bogus" and the arguments of counsel as "sleight of hand," trying to distract jurors. State v. Thorgerson, 172 Wn.2d 438, 258 P.3d 43 (2011). Such arguments implied that defense counsel was engaging in deception and "even dishonesty in the context of a court proceeding" - an argument "beyond the bounds of acceptable behavior" and amounting to "disparaging defense counsel." 172 Wn.2d at 451-52. Here, the prosecutor repeatedly implied that counsel was either urging jurors to ignore the evidence or actually trying to distract them from the "real" facts of the case.

Where the prosecutor commits misconduct, if there was no objection below, the Court will nevertheless reverse if the misconduct was so flagrant and ill-intentioned that it could not have been cured by instruction. State v. Dhaliwal, 150 Wn.2d 559, 576, 79 P.3d 432 (2003). The question is whether there was a substantial likelihood the prosecutor's comments affected the verdict." Id., see State v. Reed, 102 Wn.2d 140, 145, 684 P.2d 699 (1984). There is more than such a likelihood here. The

entire case depended upon whether the jury found that S.C. was incapable of consent as that term is defined for the purposes of second-degree rape. The prosecutor's misconduct first misstated the testimony of the alleged victim about what occurred in a way likely to directly affect the essential element of the crime and then accused counsel of improper conduct and dishonesty in pointing out defects in the state's case as "trying to distract" the jurors from the "fact" the prosecutor misstated. No curative instruction could have cured the pervasive taint of these misstatements which went directly to the crucial issue in the case and to the defense. Even if reversal and dismissal for insufficient evidence were not required, reversal and remand for a new trial would be required.

3. IMPROPER OPINION TESTIMONY DEPRIVED KREBS OF HIS RIGHTS TO FAIR TRIAL BY IMPARTIAL JURY

A new trial is required based on the improper opinion evidence admitted below. Both the state and federal constitutions guarantee the right to trial by jury. State v. Lane, 125 Wn.2d 825, 838, 889 P.2d 929 (1995); Sixth Amend. Art. I, §§ 21, 22. As part of these rights, a person accused of a crime is entitled to have jurors serve as sole judges of the evidence, its weight and credibility. Lane, 125 Wn.2d at 838. It is therefore a violation of the appellant's rights when a witness gives their opinion about the defendant's guilt or his veracity or credibility - or that of any witness. State v. Montgomery, 163 Wn.2d 577, 591-94, 183 P.3d 267 (2005).

All such opinions are improper, whether direct or made by inference. State v. Quaale, 182 Wn.2d 191, 199, 340 P.3d 213 (2014).

The right to have the jurors alone decide factual questions “is crucial to the right to trial by jury.” Montgomery, 163 Wn.2d at 590.

There is a difference, however, in the standard this Court applies on review. If counsel objects to improper opinion below, this Court will review the admission of even an indirect opinion on guilt, veracity or credibility. State v. Kirkman, 159 Wn.2d 918, 937, 155 P.3d 125 (2007). If counsel fails to object to testimony which only present an *inference* of guilt, veracity or credibility, that issue will be deemed waived on appeal. Id. But even if counsel fails to object, if a witness makes “an explicit or almost explicit statement” as to guilt, veracity or credibility, the issue may be raised for the first time on appeal, absent objection below, as “manifest constitutional error.” 159 Wn.2d at 937. When such error occurs, the constitutional “harmless error” standard applies and the burden is on the state to prove the error harmless beyond a reasonable doubt as a matter of constitutional law. Kirkman, 159 Wn.2d at 927.

Counsel objected to some but not all of the opinion testimony below. At trial, Sergeant Wallace repeatedly testified about being involved in cases involving “sex crimes” and said he used this case to “coach” a less-experienced officer on how to handle “sex crimes” cases. 1RP 100-101. He also testified that he had been told S.C. had said in her statement that “Joel Krebs and Tanner Birdsall had raped her the night before.” 1RP 101. Wallace repeatedly referred to S.C. as the “victim” until the court ultimately sustained an objection. 1RP 105.

Shortly after that, Detective Wallace described doing the “confrontation call” with S.C. and Krebs, saying:

When you're doing those calls, people doing the calls are very nervous. Nervous by being there, **they're nervous about what happened, they're nervous about acknowledging what happened to them, so sometimes they get stuck on talking to the perpetrator and kind of just - - -**

1RP 105 (emphasis added). Defense counsel objected to referring to the "perpetrator," saying, "accused would be fine." 1RP 105. The court overruled, saying "the witness is giving their answer" but also saying, "[I]et's try to use better language." 1RP 105.

A moment later, after the prosecutor asked the officer what "stood out" to him about the conversation, the officer said it was that Krebs was "adamant, told Ms. C[.] several times that he did not touch her in any way, sexual fashion." 1RP 107-108. The officer then went on:

And when she was confronting him during the calls there was long pauses between her confrontation and his response.
Normal people that I've dealt with - -

[COUNSEL]: Objection. Calls for speculation.

THE COURT: Sustained.

1RP 107-108 (emphasis added).

Counsel objected to the officer using the term "perpetrator" instead of "suspect" - and the former clearly indicates an opinion of guilt. But in addition, all of this testimony was explicit or near-explicit improper opinion testimony. An opinion is something "based on one's own belief or idea, rather than on direct knowledge of the facts at issue." State v. Demery, 144 Wn.2d 753, 760, 30 P.3d 1278 (2001). In general, it is not necessarily improper for a witness to give his opinion on an "ultimate fact," if it is otherwise admissible. See ER 704; see also Kirkman, 159 Wn.2d at 927.

But no witness may testify about his opinion as to the guilt of the defendant, or his veracity and credibility, or that of other witnesses at trial. See State v. Jones, 71 Wn. App. 798, 813, 863 P.2d 85 (1993), review denied, 124 Wn.2d 1018 (1994). To determine whether improper opinion testimony has occurred, this Court looks at 1) the type of witness involved, 2) the nature of the testimony, 3) the nature of the charges, 4) the nature of the defense and 5) the other evidence before the trier of fact. Demery, 144 Wn.2d at 759. Here, the witness was a supervising officer, whose testimony the jurors were likely to give great weight. See Kirkman, 159 Wn.2d at 928. Second, the nature of the testimony was such that it clearly told the jury his belief. Third, the nature of the charges were such that credibility was the crucial issue about whether there was a rape or not. Fourth, the nature of the defense was that there was no rape. Fifth, the other evidence before the trier of fact was the reported perceptions depended entirely upon the credibility of the alleged victim. The nature of the improper opinion was extremely damaging and directly related to the only issue before the jury - if the alleged abuse had occurred.

Reversal is required. Admission of improper opinion testimony compels reversal as a matter of presumption. Kirkman, 159 Wn.2d at 928. Only if the prosecution can meet the heavy burden of proving the constitutional error harmless beyond a reasonable doubt is the presumption of reversal overcome. See State v. Guloy, 104 Wn.2d 12, 425, 705 P.2d 1182 (1985), cert. denied, 475 U.S. 1020 (1986). It cannot meet that burden here. A constitutional error is not harmless beyond a reasonable doubt unless the prosecution proves that the untainted evidence of guilt is

so overwhelming that it *necessarily* leads to a finding of guilt. State v. Easter, 130 Wn.2d 228, 242, 922 P.2d 1285 (1996). Further, the Court must make this determination while assuming that the damaging potential of the improper opinion testimony was “fully realized.” See State v. Moses, 109 Wn. App. 718, 732, 119 P.3d 906 (2005), review denied, 157 Wn.2d 1006 (2006).

And this standard is far different than the deferential standard this Court uses in another context - the question of whether the evidence below is sufficient to support the conviction(s). See, e.g., State v. Romero, 113 Wn. App. 779, 54 P.3d 1255 (2002). In a case involving sufficiency of the evidence, this Court applies a presumption of affirming and does so unless the defendant meets the burden of proving that, even taken in the light most favorable to the state, *no* reasonable jury could have found guilt based on the evidence admitted at trial. Green, 94 Wn.2d at 221.

With the constitutional harmless error test, however, in stark contrast, the Court is *required* to reverse unless the untainted evidence of guilt is so overwhelming that no reasonable jury would *fail* to convict even absent the error, and the constitutional error that could not have had any effect on the fact-finder’s decision to convict. These two standards are very different. Compare, Romero, 113 Wn. App. at 793 (upholding based on the sufficiency of the evidence standard but then reversing based on constitutional error based on the very same evidence). The prosecution cannot show that every reasonable trier of fact would necessarily have convicted absent the improper opinion testimony from the officer that a rape - not consensual conduct - had occurred. Reversal and remand for a

new trial is required even if reversal and dismissal is not granted.

4. THE TRIAL COURT'S EVIDENTIARY RULINGS VIOLATED THE RIGHT TO PRESENT A DEFENSE AND INTRODUCED HIGHLY PREJUDICIAL, IRRELEVANT EVIDENCE

The accused have a state and federal due process right to present a defense. State v. Hudlow, 99 Wn.2d 1, 15, 659 P.2d 51 (1983), limited in part and on other grounds by, State v. Darden, 145 Wn.2d 612, 41 P.3d 1189 (2002); Washington v. Texas, 388 U.S. 14, 19, 87 S. Ct. 1920, 18 L. Ed. 2d 1019 (1967); Sixth Amend.; 14th Amend.; Art. 1, § 22. In addition, due process requires that criminal prosecutions are pursued with “fundamental fairness,” which requires giving the defendant a meaningful opportunity to defend against the state’s case. State v. Wittenbarger, 124 Wn.2d 467, 474-75, 880 P.2d 517 (1994); Chambers v. Mississippi, 410 U.S. 284, 302, 93 S. Ct. 1038, 36 L. Ed. 2d 297 (1973). In this case, the trial court’s evidentiary rulings below deprived Mr. Krebs of his constitutional rights to present a defense. Further, the court admitted highly prejudicial, improper and irrelevant evidence.

There is no question that the right to present a defense is not absolute. See State v. Jones, 168 Wn.2d 713, 719, 230 P.3d 576 (2010). A defendant has no constitutional right to present irrelevant, immaterial evidence. Washington, 388 U.S. at 16; Hudlow, 99 Wn.2d at 15. At a minimum, however, the defendant in a criminal case has “the right to put before the jury evidence that might influence the determination of guilt.” Pennsylvania v. Richie, 480 U.S. 39, 56, 107 S. Ct. 989, 94 L. Ed. 2d 40 (1987). Further, the defendant must be given the opportunity to present

his version of the events to the jury. Washington, 388 U.S. at 19. And where a case “stands or falls on the jury’s belief or disbelief of essentially two witnesses,” the credibility of the witness must be “subject to close scrutiny.” State v. Roberts, 25 Wn. App. 830, 834, 611 P.2d 1297 (1980).

Thus, the state’s highest court has held, evidence of even just “minimal relevancy” to the defense may be excluded only if the state’s interest in its exclusion is “compelling.” Hudlow, 99 Wn.2d at 16. For evidence with a high probative value, the Court said “no state interest can be compelling enough to preclude its introduction[.]” Id.

Here, the entire incident involved the question of S.C.’s level of intoxication. Before trial, the court granted the prosecution’s request to exclude testimony from witnesses who would have rebutted S.C.’s claims that she “rarely” drank or got drunk. 2RP 5. At trial, S.C. then repeatedly portrayed herself as someone who had very little experience with alcohol and being drunk. She said she had alcohol in her life, “[m]aybe once or twice.” 1RP 37. She said she was never really “a big drinker” and drank “little to none,” did not like the taste of alcohol so drank “hard lemonade.” 1RP 38. She said she was a “lightweight.” She said alcohol affected her “pretty heavily.” She maintained that she had only played “beer pong” before with water, never alcohol, and had only been drunk once or twice in her entire life. 1RP 70-73.

In general, a trial court’s decision on an evidentiary issue is reviewed for abuse of discretion. See State v. Posey, 161 Wn.2d 638, 648, 167 P.3d 560 (2007). Where, however, a discretionary decision is alleged to have violated a constitutional right, de novo review is applied. See,

State v. Jones, 168 Wn.2d 713, 719, 230 P.3d 576 (2010) (violation of right to present a defense). The trial court's ruling here violated appellant's' rights to present a defense. The entire case revolved around S.C.'s level of intoxication, a drinking game and decisions. Responsibility while intoxicated and feelings about crimes occurring when someone was voluntarily intoxicated were actually a specific part of the prosecutor's screening in jury selection. 2RP 57-63. In opening argument, the prosecutor told jurors that S.C. was feeling strange after only three drinks, "didn't quite know what was going on because had drunk before, not a lot, but she had never had that reaction before." 2RP 97-98. Her representations as to her experience with drinking were directly relevant to the allegations in this case - but went unchallenged because the trial court excluded the relevant, material evidence that she drank far more often than she claimed and might be lying about her decisions about having sex, as well. This evidence was thus relevant and material to the defense version of events - and the crucial issue of S.C.'s credibility.

This constitutional error was not the only serious, prejudicial evidentiary error committed below. The trial court also abused its discretion in allowing S.C. to testify about her speculation that she might have been drugged. ER 402 prohibits admission of evidence which is not relevant. Relevant evidence is "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable" than it would be without. ER 401.

Here, S.C. had a "blood draw" which showed no trace of any drug, including Vicodin. 2RP 22. S.C. apparently thought, however, that the

boys likely drugged her with Vicodin and wanted to testify about her suspicions and that Birdsall, who had recently broken his hand, had a prescription for the pain pill as a result. 2RP 22. Although S.C. had claimed she had only had alcohol a few times in her life, the state argued her suspicions were relevant to explain why she had a different reaction, “drinking the same kind of alcohol she had had before.” 2RP 22-24. The prosecutor also stated she was going to call a toxicologist to testify that Vicodin has a “short shelf-life,” might not have shown up in a blood test and, when mixed with alcohol, would have caused certain symptoms the state thought similar to those S.C. described. 2RP 22.

Judge Brown ruled that S.C. could testify about how she felt and found the expert’s testimony admissible, too. 2RP 24-25. He said, “[i]t would be up to the jury to decide whether it occurred or not,” and “I don’t think we need any evidence that there was, in fact, Vicodin in her system.” 2RP 24. At trial, S.C. testified that Birdsall had recently broken his hand but was inconsistent in whether he had a prescription for Vicodin or not, saying both she did not know and that they had discussed it. 1RP 48-49. She said she had an allergy to Vicodin among other things and if she had Vicodin she would get “very violently ill,” throwing up and having migraines. 1RP 38.

But S.C. also did not describe feeling different than how she normally felt when she was drinking. 1RP 49. Instead, she said, the way she felt was “just amplified” of how she had previously felt when she drank alcohol. 1RP 49. She said she did not know why that might be and thought it was “a little strange.” 1RP 49-50. She said she had not gotten

sick like that in the past when she drank. 1RP 61.

Relevance requires a “logical nexus” between the evidence to be admitted and the fact to be established. State v. Whalon, 1 Wn. App. 785, 791, 464 P.2d 730, review denied, 78 Wn.2d 992 (1970). Further, it must have a “tendency” to prove, qualify or disprove an issue. See State v. Demos, 94 Wn.2d 733, 737, 619 P.2d 968 (1980). Here, the fact that she was suspicious that she might have been drugged even though the medical test was *negative* was irrelevant to anything at issue in the case. She was already saying she was too drunk to stand up. She said she consumed 3-4 drinks quickly. The additional, unsubstantiated suspicion she had that there was something far more nefarious going on was not relevant or necessary to prove any essential element of the state’s case. Further, it was highly prejudicial. The issue is not whether the evidence is “prejudicial” in the sense that it is detrimental to someone, but rather whether it will “arouse the jury’s emotions of prejudice, hostility, or sympathy” and thus would have “the effect of disrupting the trial or sidetracking the search for truth.” Hudlow, 99 Wn.2d at 12-13.

Here, what the improperly admitted evidence introduced into the case was the idea of S.C.’s *intentional* drugging by Birdsall and Krebs. This suggestion took the case completely into a new realm, from possibly just taking advantage of one who is very drunk into deliberate, malicious conduct for the purposes of facilitating a crime. The result of allowing S.C. to suggest that she might have had a drink spiked with Vicodin, with no evidence to support it and in light of the nature of the case, was to prejudice the jury against Krebs based on pure speculation. But a

defendant must be tried for the charged offense, not for uncharged crimes improperly admitted at trial. See State v. Goebel, 40 Wn.2d 18, 21, 240 P.2d 251 (1952), overruled in part and on other grounds by State v. Lough, 125 Wn.2d 847, 860, 889 P.2d 487 (1995).

The trial court's decision to admit this evidence was an abuse of discretion and this Court should so hold. This Court should further find there is more than a reasonable likelihood that the admission of this improper, speculative evidence of further criminal wrongdoing affected the verdict and compels reversal in the case.

5. CUMULATIVE ERROR COMPELS REVERSAL

In the unlikely event that the Court does not find that reversal and dismissal is required, or that the individual trial errors, standing alone compel reversal, reversal should still be ordered, because the cumulative effect of the trial errors deprived Krebs of his state and federal due process rights to a fair trial. Such cumulative effect may compel reversal. See State v. Johnson, 90 Wn. App. 54, 74, 950 P.2d 981 (1988). This is because the accumulation of errors may result in a fundamentally unfair trial. See State v. Hodges, 118 Wn. App. 668, 673, 77 P.3d 375 (2003), review denied, 151 Wn.2d 1031 (2004).

Here, all of the errors went directly to the issues crucial to the determination of guilt at trial. The prosecutor misstated the evidence about the disputed element, multiple times. Those misstatements told the jury the state had met its burden based on S.C.'s testimony at trial, when it had not. The prosecutor also told jurors that counsel - and thus the defense - was trying to ensure that the jury did not focus on the "fact" misstated

(whether S.C. testified she was conscious when the intercourse began). The judge excluded relevant, material evidence without which the jury was left with an unrebutted view of S.C. and her alcohol use which was incorrect and relevant, due to the alcohol involved in the case. Then, the judge let in speculation that the defendant not only raped her but *drugged her to do so*, without evidence to support that claim. Even if the individual errors did not compel reversal on their own, their cumulative effect deprived Krebs of his rights to a fair trial and reversal should be granted on that ground.

6. COUNSEL WAS PREJUDICIALLY INEFFECTIVE IN NOT REQUESTING AN EXCEPTIONAL SENTENCE DOWN PURSUANT TO O'DELL

Mr. Krebs was born on October 3, 1997. CP 1. The offense occurred on February 9, 2016, when he was just a few months past his 18th birthday. CP 1. But at sentencing, counsel did not ask for the court to consider the mitigating factors of youth and impose an exceptional sentence below the standard range under O'Dell. Counsel was prejudicially ineffective in that failure, and reversal and remand for a new sentencing with new counsel is thus required.

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, 1) his representation was “deficient,” and 2) 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). In this case, those circumstances are that Mr. Krebs was just a few months older than 18 at the time the incident occurred, and thus eligible for an exceptional sentence below the standard range based on the mitigating factors of youth, under O'Dell.

In O'Dell, decided well before sentencing here, this state's highest Court addressed the options for sentencing where, as here, a person who is only 18 has committed a crime. First, the O'Dell Court recognized recent developments in our understanding of the neurological, physically verified differences between a youth and an adult. 183 Wn.2d at 687. This included recognition that "adolescent brains, and thus adolescent intellectual and emotional capabilities, differ significantly from those of mature adults[.]" Id.; see also, RCW 9.94A.540. Although the Court had previously indicated a belief that a sentencing court could not consider the relative youth of an adult as a mitigating factor at sentencing, the O'Dell Court found, to the contrary, that it could. O'Dell, 183 Wn.2d at 690-91.

The Court declared:

The legislature has determined that all defendants 18 and over are, *in general*, equally culpable for equivalent crimes. But it could not have considered the particular vulnerabilities - for example, impulsivity, poor judgment, and susceptibility to outside influences - of specific individuals. The trial court is in the best

position to consider those factors.

Id. In addition, the O'Dell Court noted, the legislature did not have the benefit of the “data underlying” recent U.S. Supreme Court cases such as Miller, supra, including the neurological and psychological research showing that “‘parts of the brain involved in behavior control’ continue to develop well into a person’s 20’s.” Miller, 132 S. Ct. at 2464, quoting, Graham v. Florida, 560 U.S. 48, 68, 130 S. Ct. 2011, 176 L. Ed. 2d 825 (2010); O'Dell, 183 Wn.2d at 691-92. The O'Dell Court noted these fundamental differences have a severe impact on culpability - and thus, potentially, on the sentence:

These studies reveal fundamental differences between adolescent and mature brains in the areas of risk and consequence assessment, impulse control, tendency toward antisocial behaviors, and susceptibility to peer pressure. As *amici*. . . put it, “[u]ntil full neurological maturity, young people in general have less ability to control their emotions, clearly identify consequences, and make reasoned decisions than they will when they enter their late twenties and beyond. . . [t]he [U.S. Supreme] Court recognized that these neurological differences make young offenders, *in general*, less culpable for their crimes[.]

O'Dell, 183 Wn.2d at 692. As a result, because “the heart of the retribution rationale” is based on “an offender’s blameworthiness,” the Court noted, where the offender is a youth, the justification for the same sentence as a fully mature adult is much less. Id., quoting, Miller, 132 S.Ct. at 2458.

The O'Dell Court then found that this diminished moral culpability for criminal conduct did not automatically end the day the youth turned 18. O'Dell, 183 Wn.2d at 694. Indeed, the Court noted, the U.S. Supreme Court has found “[t]he qualities that distinguish juveniles from adults do

not disappear when an individual turns 18 [just as] some under 18 have already attained a level of maturity some adults will never reach.” O’Dell, 183 Wn.2d at 694, quoting, Roper v. Simmons, 543 U.S. 551, 574, 125 S. Ct. 1183, 161 L. E. 2d 1 (2005). The O’Dell Court concluded: “a defendant’s youthfulness can support an exceptional sentence below the standard range applicable to an adult felony defendant,” and “the sentencing court must exercise its discretion to decide when that is.” O’Dell, 183 Wn.2d at 698-99.

O’Dell was decided by our state’s highest court on August 13, 2015. O’Dell, 183 Wn.2d at 680. It is directly relevant to cases where, as here, the defendant is just a few months older than 18 at the time of the crime. 183 Wn.2d at 699. It specifically holds that relative youthfulness is a mitigating factor which may support an exceptional sentence below the standard range. 183 Wn.2d at 699.

But at sentencing here, more than a year later, counsel never once mentioned O’Dell. 2RP 31-52. He did not discuss the relative - and *transitory* - weaknesses of youth identified in Miller and made directly relevant to his client’s case in O’Dell. 2RP 31-52. He did not cite a single study or case on those weaknesses - even though those are the very same qualities which logically contributed to the conduct in this case. 2RP 31-52. These include studies showing that the psychosocial deficiencies of youth persist well into late adolescence and into early adulthood as a matter of cognitive development - as O’Dell specifically found. O’Dell, 183 Wn.2d at 697-99; see Elizabeth Cauffman & Laurence Steinberg, *(Im)maturity in Adolescence: Why Adolescents May Be Less Culpable than*

Adults, 18 BEHAV. SCI. & L. 741 (2000).

Lower impulse control, lack of suppression of aggression, inability to foresee consequences, lack of fully developed ability to conform to particular conduct or control behavior, inability to underestimate risks, self-focus to the detriment of others, ability to self-regulate, lesser ability to resist peer influence - every one of these is neurologically linked to the development of areas of the brain, such as the prefrontal cortex - areas not fully developed until mid-20s. Laurence Steinberg et al., *Age Differences in Sensation Seeking and Impulsivity as Indexed by Behavior Self-Report: Evidence for a Dual Systems Model*, 44 DEVELOPMENTAL PSYCHOL. 1764 (2008) (indicating that adults make better “adaptive decisions” in situations than youth because of adult ability to resist social and emotional influences and foresee consequences long-term); Adriana Galvan et al., *Risk-Taking and the Adolescent Brain: Who is at Risk?* 10 DEVELOPMENTAL SCI. F8-F14 (2007) (discussing impulse control development).

These weaknesses are not a sign of “bad character” but a “hallmark of youth.” And importantly, they are *distinct* from development of capacity to reason and understand. See Kristin Henning, *Criminalizing Normal Adolescent Behavior in Communities of Color: The Role of Prosecutors in Juvenile Justice Reform*, 98 CORNELL L. REV. 383, 397 (2013). Such cognitive abilities generally form by age 15 or 16, so that a youth of that age generally will have such abilities similar to adults, at least in controlled settings. See id.

But the weaknesses identified and discussed in O’Dell all persist

into early adulthood *even for youth with the ability of general reasoning and understanding*. This is not about “character” or “self-control” as an immutable, fixed ability - this is because “brain structures responsible for logical reasoning, planning, self-regulation, and impulse control are the last to mature and develop.” Henning, 98 CORNELL L. REV. at 397, quoting, Brief of Amici Curiae Supporting Neither Party, American Medical Ass’n et al., *filed in Miller, supra* (Nos. 10-9646, 10-9647) at 14-36. Put another way, “[t]here is incontrovertible evidence of significant changes in brain structure and function during adolescence” which is directly relevant to determining actual culpability and determining the proper sentence to impose. See Laurence Steinberg, *Should the Science of Adolescent Brain Development Inform Public Policy?* 64 AM. PSYCHOLOGIST 739, 742 (2009).

Counsel did not have to be aware of these studies. All he had to do was be aware of O’Dell. And O’Dell is a relevant, applicable decision from the state’s highest court, discussing the proper sentence to be imposed in a case where, as here, the defendant was still 18 when the crime occurred. Counsel’s failure to be aware of this relevant law and his failure to present the court with any supporting arguments regarding the vulnerabilities of youth was deficient performance. Failure to argue or cite relevant caselaw is below the objective standard of reasonableness if that failure prevents the court from making an informed decision. See State v. McGill, 112 Wn. App. 95, 47 P.3d 173 (2002). It cannot be seen as a legitimate sentencing strategy to fail to cite O’Dell, a case directly relevant to your client’s unique sentencing situation which supported going even

lower than the standard range in sentence. See McGill, 112 Wn. App. at 97 (prejudicially ineffective in failing to cite authorities which would have permitted the sentencing court to impose an exceptional sentence below the standard range).

There can be little question counsel's unprofessional failure to cite O'Dell was prejudicial. Indeed, even for the sentence counsel argued for below, failing to cite O'Dell and Miller and the mitigating qualities of youth was ineffective and prejudicial. Counsel's only argument was that Krebs was generally a good, responsible mini-adult who was "on track" but had a "bad few months there" and went "off the rails," in a way that was out of character. 2RP 38; CP 172-82 ("consistent theme" of "how hard[-]working, polite and courteous" Krebs is). All the letters of support set forth this theme, too. CP 176-82. Counsel mentioned and relied on his client's youthfulness and how significant the penalty he faced ("1/3 of his life thus far"). CP 175. And counsel was aware that the prosecution was seeking the highest possible standard range sentence. See CP 136-44.

Further, that request was based on the same vulnerabilities and temporary failings of youth discussed in O'Dell. The state faulted Krebs for what it called his "mindset" of "why not" do what he wanted and then just impulsively doing it. CP 142. His failure to take responsibility, his "denial" of culpability, his committing a "horrific crime" while pending trial for a train derailment case due to other bad behavior, his "disregard" for restrictions and inability to regulate behavior - all of these were cited as showing Krebs "is and continues to be a danger and . . . should be put away for as long as possible to ensure the safety of the community as a whole."

CP 142. But more than a year before, in O'Dell, our state's highest Court recognized that exactly these types of behaviors - the weaknesses of youth - are *not* necessarily evidence of such danger to the community, because they are transient and pass with full neurological development. See O'Dell, 183 Wn.2d at 697-99.

The sentencing court was also clearly skeptical of counsel's claim that Krebs was living "a great life, had a few months where he went haywire, and is back on track" - claims which fell immediately when the court reminded counsel that Krebs had been living with his girlfriend, S.C., in a motor home on someone else's property, away from his home when he was a minor. 2RP 37-38. The court was looking for an explanation and in fact thought it must be "because of trouble that Joel was causing." 2RP 38. The judge was concerned that Krebs had started to "let partying get out of hand" his senior year of high school but time in jail did not appear to "change" him. 2RP 39. The judge noted that most of the time Krebs was "behaving" but faulted him specifically for the very vulnerabilities of youth:

[M]ost people have to control their behavior in all situations, and when you start at a young age, you say, well, I am going to be the adult here, I am going to go and live out on my own, and then I am going to start drinking in spite of what the law says, and then I am going to supply alcohol to other people who are underage, because that's a lot more fun, apparently. **And just without any conception about what you are doing, without any thought . . . you could have been . . . working on cars instead of hanging out with these other people and drinking all the time and partying. So those are all the choices that you made.** Not everybody who is under age that drinks, you know, has a disaster, but you did.

2RP 42 (emphasis added). The judge commented on how Krebs did not change his behavior, even after a judge told him what to do, "that didn't

change anything,” and Krebs needed to learn about “behaving appropriately at all times[.]” 2RP 42-43. And the judge specifically faulted Krebs for his “character” in doing as *immutable*, directly contrary to the holding of O’Dell, Miller and neuroscience-

You had choices at all times to do things, and even afterwards you had choices you didn’t take. Which again, kind of shows your character, unfortunately. It’s a different character than what other people that you have come in contact with [in] your life [saw[. . .

2RP 44 (emphasis added). The court also talked about how Krebs was going to need to understand how to change his behavior, how it affected other people, but again declared that Krebs had “somewhere along in life” decided “that some of these rules” don’t apply to him like everyone else, such as not drinking as a minor, not telling the truth and confessing right away, “[s]o, it’s just kind of these situational ethics that you just don’t have.” 2RP 45.

Thus, while the judge said he was considering Krebs’ “youth,” he did so completely without assistance or insight from the relevant caselaw from our state’s highest court. He did so without explanation of the transient nature of the weaknesses of youth - the very things he faulted Krebs for and assumed were evidence of his permanent “character.” He did so because counsel failed to be aware of and cite the relevant law on behalf of his client. There is more than a reasonable probability that the result of the proceeding would have been different, “except for counsel’s unprofessional errors.” McFarland, 127 Wn.2d at 334-35. Resentencing with new counsel should be granted.

7. IMPROPER AND UNCONSTITUTIONAL CONDITIONS
MUST BE STRICKEN

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). A condition which exceeds that authority must be stricken. State v. O'Cain, 144 Wn. App. 772, 775, 184 P.3d 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).

As a threshold matter, counsel objected below to many of the conditions, but an illegal or erroneous condition of community supervision may be challenged for the first time on appeal. Bahl, 164 Wn.2d at 74-45. Further, where the challenges are to whether the trial court had statutory authority to impose the conditions and whether the conditions as written are unconstitutional, it is irrelevant that the defendant is still in custody and the conditions thus not yet enforced. Id.; see State v. Jones, 118 Wn. App. 199, 204, 76 P.3d 258 (2003). The conditions in this case regarding possession of drug paraphernalia, getting a substance abuse evaluation and treatment and random testing to monitor "drug-free" status were not authorized by statute. See RCW 9.94A.703, RCW 9.94A.505. Nor was drug abuse involved for the purposes of ordering drug monitoring, treatment and testing for the rest of Krebs' life. 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 at minimum 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). This is because “[p]ersons 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).

This same problem occurs for the conditions DOC suggested, counsel objected to and the court orally appears to have intended to impose, many of which are also unconstitutional. See CP 161-68, 2RP 35-36, 2RP 46-48. This Court need not address those conditions, however, save to clarify that they were not imposed, because the written judgment and sentence of the sentencing court neither includes those proposed conditions nor refers to and incorporates any “Appendix H.” CP 183-97. A trial court’s written order controls over its oral findings, even if they contradict. See State v. Bryant, 78 Wn. App. 805, 821-13, 901 P.2d 1046 (1995); State v. Martinez, 76 Wn. App. 1, 3 n. 3, 884 P.2d 3 (1994), review denied, 126 Wn.2d 1011 (1995).

If these conditions *had* been ordered, however, they would still need to be stricken as not statutorily authorized and/or in violation of constitutional law. Proposed condition (27) prohibiting going to “places where children congregate” was clearly not “crime-related” or authorized, as the law is clear that a condition limiting contact with or relating to minors is not reasonably related to the crime of raping a 19-year-old-woman. State v. Riles, 135 Wn.2d 326, 349-50, 957 P.2d 655 (1998), abrogated on other grounds by State v. Sanchez Valencia, 169 Wn.2d 782, 239 P.3d 1059 (2010). A condition to submit to polygraph and plethysmograph examinations as directed by the CCO” is not authorized; polygraphs must be limited to only monitoring compliance with other conditions of community custody. Riles, 135 Wn.2d at 351-52. plethysmograph testing is “extremely intrusive,” serves no monitoring purpose, cannot be ordered by DOC and can only be ordered by a qualified treatment provider as part of a treatment plan, not as “a routine monitoring tool subject only to the discretion of a community corrections officer.” Land, 172 Wn. App. at 605-606.

Further, unlike with statutes, there is no longer a presumption of constitutionality for a condition of community custody. State v. Sanchez Valencia, 169 Wn.2d 782, 792-93, 239 P.3d 1059 (2010) (overturning presumption). Conditions not to peruse sexually explicit material, go to “x-rated movies, peep shows” or adult bookstores, are not crime-related, as there is no evidence whatsoever such materials were involved. Further, a person convicted of a crime is not divested of all First Amendment rights. Bahl, 164 Wn.2d at 757-58; Packingham v. North Carolina, 582 U.S. ___,

137 S. Ct. 1730, ___ L. Ed. 2d ___ (June 19, 2017). Adult pornography is protected by the First Amendment. See Reno v. ACLU, 521 U.S. 844, 117 S. Ct. 2329, 138 L. Ed. 2d 874 (1997). Without proof exercise of those rights was in any way related to the crime, such conditions do not withstand the stricter standard applied to conditions infringing on such rights. See Bahl, 164 Wn.2d at 758.

Finally, while a condition regarding alcohol consumption is clearly related to the crime, the proposed DOC condition prohibiting entry of “any business where alcohol is the primary commodity for sale” is unconstitutionally vague and overbroad. Such a business is not where the crime occurred. But more important, what, exactly, constitutes such a business? Does it include grocery stores? Taverns which also sell food? Even if the DOC conditions had been imposed, the bulk of them would have to be stricken, as well as the imposed conditions which were not statutorily authorized and/or run afoul of Krebs’ constitutional rights.

8. THE SEALING WAS IMPROPER

Under RCW 7.90.150(6), where person is convicted of a sex offense and a condition of the sentence is to have no contact with the victim, “the condition shall be recorded as a sexual assault protection order,” and must include certain language. It appears that such an order was presented and entered in this case. See 2RP 49. At the same time, however, it appears the court simply filed an order sealing the document as well as a similar document which had been entered on August 26, 2016. 2RP 49; CP 219. The parties signed the order which indicated “there was sufficient reason to seal a document” because it “contains the name of a victim, and the

document should be sealed because of the victim's compelling privacy and safety concerns at the request of the victim." CP 219.

This Order violated Articles §10 and 22, which mandate open justice and a public criminal proceeding. See, Bone-Club, 128 Wn.2d at 261-62. Further, they violated GR 15. A court may only seal part of a criminal proceeding if it first analyzes the potential closure under five factors set forth in Bone-Club, on the record, such as whether the party seeking closure has shown a compelling interest in closure, whether the party has shown a "serious and imminent threat" from failing to seal and whether it is the "least restrictive" means of ensuring the "compelling interest." See State v. Waldon, 148 Wn. App. 952, 966-67, 202 P.3d 325, review denied, 166 Wn.2d 1026 (2009). GR 15 requires only showing a "compelling" interest, but the constitution requires a showing that is "specific, concrete, certain, and definite" as well. Waldon, 148 Wn. App. at 962-63. Further, the purpose of these rights and the mandate of having a criminal trial wholly public serves to remind judges and prosecutors "of their responsibility to the accused and the importance of their functions," as well as to discourage perjury. State v. Sublett, 176 Wn.2d 58, 73, 292 P.3d 715 (2012). There is a presumption of openness which is so strong that an exception "is appropriate only in the most unusual of circumstances." Hudtofte v. Encarnacion, 181 Wn.2d 1, 330 P.3d 168 (2014). Notably, the constitutional mandates do not automatically cease to exist whenever there is a victim - indeed, they exist even when 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); see also, State v. Parvin, 184 Wn.2d

741, 364 P.3d 94 (2015) (violation when family courts sealed expert evaluations used in termination proceedings ex parte). The name and details of a victim in a case prosecuted in our courts will by definition become public as “an attendant consequence of trial.” State v. Boyd, 160 Wn.2d 424, 440,156 P.3d 54 (2007). The sealing order should be stricken.

E. CONCLUSION

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

DATED this 30th day of July, 2017.

AS AMENDED PER COURT ORDER TO REMOVE

NAME/SUBSTITUTE INITIALS:

DATED this 7th day of May, 2018.

Respectfully submitted,

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7CERTIFICATE 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 Amended Opening Brief to opposing counsel VIA this Court's upload service, at appeals@co.grays-harbor.wa.us; and mailed a copy to Joel Krebs/DOC#393156, Coyote Ridge Corrections Center, PO Box 769, Connell, WA 99326.

DATED this 7th day of May, 2018,

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