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No. 50424-3-II

Clark County # 10-1-00389-4

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

STATE OF WASHINGTON,

Respondent,

v.

BRUCE LEE FRITZ,

Appellant.

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

The Honorable Derek Vanderwood, Judge

APPELLANT'S OPENING BRIEF

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A. ASSIGNMENTS OF ERROR

1. Appellant Bruce Fritz was deprived of his Article 1, §22, and Sixth Amendment rights to effective assistance of counsel.
2. Counsel's ineffectiveness prejudiced appellant's state and federal due process rights to present a defense.
3. The prosecutor committed flagrant, prejudicial misconduct and counsel was again ineffective.
4. The trial court abused its discretion in admitting evidence under the hearsay exception for statements made for the purposes of medical treatment and diagnosis without proper foundation.
5. The trial court abused its discretion in allowing the prosecution to reopen its case to present additional testimony from the first trial prosecutor.
6. Even if each individual error standing alone did not support reversal, the combined weight of the errors together denied Fritz of a fair trial.

B. QUESTIONS PRESENTED

1. Did trial counsel's performance fall below an objective standard of reasonableness where he failed to renew his motion to present evidence which would have given an alternate explanation for the alleged victim's precocious knowledge, other than Mr. Fritz's guilt?

Further, did counsel's unprofessional conduct implicate his client's due process right to present a defense where the excluded evidence was relevant, material and important for the defense?

2. Did the prosecutor commit flagrant, prejudicial and ill-intentioned misconduct by repeatedly inflaming passions and prejudices, bolstering the accuser, misstating reasonable doubt, impugning counsel's role and character and shifting a burden to Fritz?

Further, where such flagrant misconduct occurs, is trial counsel prejudicially ineffective in failing to object below, thus subjecting his client to a higher standard of review on appeal? Was counsel further ineffective in misstating the law in his argument as well?

3. Does the state fail to establish that statements are admissible as “made for the purposes of medical diagnosis or treatment” where there is no testimony establishing that the 8-year-old knew that she needed to be truthful when speaking to the counselor in order to get treatment and thus the entire foundation of “reliability” underlying the exception was not met?
4. Did the trial court abuse its discretion in allowing the state to reopen its case in order to present additional testimony of the first trial prosecutor, in violation of RPC 3.7, the “advocate-witness” rule?
5. Where there is no physical evidence, the only issue at trial is credibility, and all of the errors directly impact that issue, does the combined weight of their corrosive effect compel reversal?

C. STATEMENT OF THE CASE

1. Procedural facts

Appellant Bruce Lee Fritz was convicted after jury trial in 2010 in Clark County superior court of four counts of first-degree rape of a child and two counts of first-degree child molestation, all with the aggravating circumstances of “abuse of trust” and “ongoing pattern,” as well as a “multiple current offenses” aggravator. CP4-8, 137-53; RCW 9A.44.073; RCW 9A.44.083; RCW 9.94A.525(3)(n); RCW 9.94A.535(2)(c); RCW 9.94A.545(3)(g). After sentencing Fritz appealed and, on July 31, 2012, the court of appeals affirmed. CP 160-92. On February 2, 2016, the Court granted Fritz’s timely personal restraint petition (“PRP”),¹ ordering a new trial. CP 201-215.

Retrial proceedings were held on April 26, May 3-5 and 9, June 22, September 21, October 13, and November 18, 2016, January 19 and

¹More details of the Court’s Ruling are in the argument section, *infra*.

March 23, 27-31 and April 3-4, 2017,² with a jury trial before the Honorable Judge Derek Vanderwood. The jury found Fritz guilty of two counts (I and II) of child rape and one (V) child molestation plus the aggravators but entered “not guilty” findings for two counts (III and IV) of child rape and one (VI) of child molestation. CP 503-516; RP 1758-59. Sentencing was held on May 9, 2017, and Judge Vanderwood imposed a standard-range sentence. CP 533-52; RP 1817-18. Mr. Fritz appealed and this pleading follows. See CP 552-70.

2. Testimony at trial

For several years, L lived with her mom, Regina Pack,³ and her mom’s boyfriend, Bruce Fritz, first in an apartment and then a house. RP 1052-53, 1074-76. L was eight years old on March 13, 2010, when she told her mom that Fritz had “child molested” her and it had started when she was six. RP 1052-56, 1086, 1331-42.

L knew the phrase “child molested” and what it involved because her teacher had given her a paper with information about watching out for it. RP 1055-56. Her mom also discussed “good touch/bad touch” with her often. RP 1331, 1341-42. Ms. Pack would ask L if anyone had ever touched her in an improper place and L would always say “no.” RP 1432. Ms. Pack also told L she should tell Pack if anyone ever touched her. RP 1331-42. L never said anything until that day, when Pack stopped home for a few minutes in

²The verbatim report of proceedings consists of one chronologically paginated volume.

³During the first trial, L’s mom had the last name of Fowler, but by the second trial she had married and her last name changed to “Pack.” RP 1296.

between work and a study date with friends. RP 1314-15, 1331-42.

Mr. Fritz was laying on the couch watching TV L came down the hall and asked Pack, who was in the kitchen, to talk. RP 1095, 1315. Ms. Pack said she told L “if she had something to say she can say it in front of both of us,” after which L got upset and went down the hall into the bedroom Pack and Fritz shared. RP 1315-17. Ms. Pack followed. RP 1317. L was crying and holding her knees to her chest. RP 1317.

Ms. Pack laid down on the bed and asked L what was wrong. RP 1316-17. After first demurring, with further prompting, L then said Fritz had been trying to have sex with her. RP 1317. Ms. Pack did not remember what happened at that point. RP 1317. She did not recall asking L any follow-up questions, or for details or explanation. RP 1317. Indeed, Pack did not remember anything else about the conversation at all. RP 1317. The next thing she recalled was going to the garage to find Fritz. RP 1339.

Mr. Fritz looked surprised, even stunned by what she asked. RP 1340. He told Pack that nothing like that had ever happened. RP 1319, 1340. Ms. Pack then had L and Fritz sit down with her at a table. RP 1319. At trial, Pack could not recall what was said, but she knew that at some point Fritz got “teary” about the accusations and walked away. RP 1319-41. That was when L would tell her mom she was not lying. RP 1319-20, 1340-41. L would recall Fritz saying to L that she needed to stop lying and tell her mom the truth. RP 1097. When Fritz cried, L said, “he’s only crying because he knows you have to

leave him.” RP 1131.

After the conversation, Pack called her mom, Darbie Luce, to report L’s claims. RP 1320-21. Again, however, Pack did not recall what was said. RP 1320-21. Ms. Pack and Fritz drove L over to Luce’s house and dropped the child off, Pack said, “[s]o she’d be safe.” RP 1320-21. But Pack did not stay with her daughter. RP 1321-48. Instead, she drove home with Fritz. RP 1321-48. Although she did not initially recall, ultimately Pack would admit that she took a shower with Fritz that night. RP 1321-48.

They talked for a long time and at some point, Pack claimed, Fritz admitted to having touched L. RP 1322. But Pack did not remember what Fritz actually said. RP 1322. Although she would testify at trial that this admission occurred probably past midnight, Pack had previously told people that it had been in the morning, at 5 or 6, instead. RP 1322, 1345.

Ms. Pack testified that there were two such admissions - one that night or the following morning and the other at the home of his family, the next day. RP 1345-46, 1363. They had gone there after waking up. RP 1323. According to Pack, she told him he needed to tell his family what he had done and he did so. RP 1323. Again, however, Pack did not remember the words Fritz had actually used or what, exactly, was said. RP 1324. She also did not remember that she had told an investigating officer that Fritz had never said anything about intercourse and had only said he had touched - not penetrated - L’s private parts. RP 1346-47.

On the way home from his family's home, Pack spoke to her mom on the phone. RP 1323, 1351. Ms. Luce said she had told someone about L's allegations and that person had reported them to police. RP 1323, 1351. Ms. Pack herself then called. RP 1327, 1350-65. Even after that, she continued to see him, sitting with him in class, communicating by phone and keeping in touch by social media. RP 1354. Ms. Pack first maintained they just "still talked," stating it was not "dating," but finally conceded they were together as a "couple." RP 1355.

At first, Ms. Pack maintained that the relationship between L and Fritz had been fine before L made the disclosure. RP 1307. Aside from arguments about things like bedtime, Pack did not think there were any "big issues." RP 1307. Indeed, she had planned to marry Fritz until L raised her claims. RP 1302-03, 1347. Ms. Pack would also say that L had no trouble arguing with or standing up to Fritz when Pack was around. RP 1362-63. Ultimately, Pack would admit that L had repeatedly told her mom she thought Fritz was mean. RP 1362.

L testified that even without the alleged abuse she had already not liked Fritz. RP 1104. If she did something wrong, she said, Fritz would punish her, then go outside to smoke cigarettes in the garage. RP 1106-1107. Also, he yelled at her too much. RP 1106-07. She said there was a time he grabbed her arm and she got a bruise, and he had also hit her on the leg and she bruised there, too. RP 1108, 1143. There were also times her mom used to have to separate L from Fritz because they argued and fought. RP 1108.

L admitted in a defense interview that, unrelated to the allegations, L thought Fritz was mean to her. RP 1108. Not only that, L's mom always took Fritz's side. RP 1108. L did not like that. RP 1108-1109. Indeed, when Pack had told L that Pack and Fritz were going to get married, L was very unhappy, not wanting to be stuck with Fritz for the rest of her life. RP 1109.

When Pack called her mom about the claims, Luce was shopping but said she would be home in a few hours, so Pack, Fritz and L drove to Oregon that night. RP 1428-34. When they arrived, L did not seem upset at all and scampered into a bedroom to play computer games. RP 1437. Once Pack and Fritz left, Luce went to question L about the allegations. RP 1437-38. Ms. Luce said she tried to ask her granddaughter open-ended questions. RP 1437-40. In that conversation, the eight-year-old then told her grandma that Fritz would come into the room with a blue bathrobe on and have an erection. RP 1438. L also said he played "porn" movies and had them act things out. RP 1441. The child also reported that once he gave her a bath and then in her room he licked her vagina and she laughed because it tickled, after which he rubbed his penis on her, there was some "white stuff that people leave on you," and he cleaned it up with one of the black towels they used at the home. RP 963-65, 1040-41, 1442-43.

Ms. Luce first testified that she did not ask the child for specifics during the conversation. RP 1439-41. She then admitted that she had asked for "more details on items." RP 1439-41. She

maintained, however, that she tried to let L explain things in her own words. RP 1439-41.

L testified that she told her grandma a “little bit” about what happened, and her grandma had asked questions. RP 1099. L did not recall, though, whether Luce had given L examples or asked “did he do this, did he do that” when they spoke. RP 1099.

Grandma and child had several conversations about the alleged abuse. RP 1445. On one day sometime after Pack and L had moved in with Luce in Oregon, L came up and announced, “it was kind of gross” but he had put his penis in her mouth. RP 1445. L also told Luce that L had not told anyone because Fritz had warned if she did she would have to go live under a bridge. RP 1450.

With her own mom, however, L did not discuss the allegations more. RP 1328-30. L would sleep with Pack and reported nightmares about Fritz but gave no details. RP 1100-1101, 1336.

As a result of the reports to police, an officer came to Luce’s Oregon home. RP 967, 1328-31. That officer was U.S. Special Agent Aaron Holladay, who was working as an officer for the Vancouver Police Department (“VPD”) and assigned to the Children’s Justice Center at the time. RP 927-30. The agent spoke first with L, then with Pack. RP 940-41, 995-96.

Alone with the child, the agent established that the eight-year-old could spell her name, give the “ABCs,” knew her age, birthday, address, the names of family members, and her mom’s phone number. RP 942-43. They talked about “truth versus lie and

other concepts” and L said she knew the difference and gave an answer the agent said was correct when given a scenario. RP 942-43. L also told the agent she would tell the truth, and gave an example about lying involving cleaning her room. RP 946-97.

When asked if she knew why the agent was there, L at first did not know, then guessed it was because of her dad, which the agent took to mean Fritz. RP 947. Upon questioning, L told the agent, “he had s-e-x with me,” responding to the agent’s follow up questions about “s-e-x” by saying it was “something that grown-ups would do.” RP 947-48. L then said that Fritz had touched her “crotch” and “bottom” with “his mouth and his weiner and his fingers.” RP 947. She said it happened in his bedroom with the door locked and mom not there, and that he had done it since she was six, adding, “I’m eight, that’s two years.” RP 947-48, 952. The eight-year-old maintained that she had an “awesome remembering brain.” RP 953. L said it happened in her old apartment, in her room, in the bathroom, and on the couch. RP 952-53. She said the first time he had come into the bedroom, taken her clothes off, taking his clothes off, and licked her “crotch.” RP 953.

Agent Holladay asked L what happened in the bathroom and the child responded, “we were in the bathroom.” RP 953-54. The agent then repeated the question. RP 954. This time, L responded, “he tried to stick his weiner in my bottom.” RP 954. When the officer encouraged L to say more, L said “he was trying to put me on the floor, I was screaming and crying and he tried to stick it in. It

really hurt bad. He told me to shut up and just relax.” RP 954.

L told the agent it had been only six or seven days at most since she had last been abused. RP 959-60. But she could not remember seeing Fritz’s “weiner.” RP 955-56, 980-81. She also did not remember what it looked like. RP 955-56, 980-81. After the agent persisted, however, and asked specifically if Fritz’s penis was sticking up or down and after several tries, L said it was up. RP 955-56, 980-81. At trial, L would later recall that it had actually been several months since the abuse at that time, not a few days. RP 1128.

At first, Agent Holladay did not agree that the questioning he engaged it was improper. RP 980-81. Ultimately, however, the agent admitted the child told him twice she did not remember even seeing his “weiner” and the agent had then continued to ask what it looked like. RP 982. Agent Holladay confirmed that the repetitive asking could make a child “inclined to come up with an answer.” RP 982.

The agent also admitted that it was problematic when a child has spoken to a number of people about accusations because of the risk of suggestibility. RP 938-40. He knew L had already talked to at least two people before him. RP 939.

The agent asked L where Fritz had licked, and the child responded, “he likes to lick me on my bottom, he likes to lick me on my boobs, my crotch.” RP 856. She said liquid came from him and, when asked for more details, said it was “milk liquid that looks like pus and he said it makes him feel pleas - like pleasure.” RP 958. L also said he would take his hand and slap it on her bottom and say

“good girl,” something he knew she did not like. RP 958. L said it had happened 20 times at the apartment and at least 30 times at the home. RP 958-59, 985-86.

The agent asked Pack for any porn DVDs, and Pack gave him two. RP 1033. Agent Holladay never watched the discs and had no idea what was on them. RP 1033. He did not know that one only had all-female porn. RP 1033. He also could not say whether the DVD with men and women had any activities that L described having to act out. RP 1087.

Although L had told the agent that she had been looking up on the home computer online, searching how to stop dads from having sex with kids, he never took that computer into evidence. RP 963, 1022. At trial, the agent would say that would require a warrant but not explain why that was an issue. RP 1022, 1037-38, 1044. Nor could he explain why he did not just ask Pack for it, like he had with the DVDs. RP 1022-44.

The agent testified about the goal of his interviews as ensuring as much as possible that children give reliable statements. RP 930-35. He maintained that recording interviews with children alleging sex abuse was not considered a “best practice” when he conducted the interview of L in 2010. RP 936, 987, 1035. On cross-examination, however, he was confronted with his own presentation as an expert at the Children’s Justice Center, which showed he had failed to follow his own recommendations on investigating and corroborating child sex abuse claims. RP 1000-1010. In that presentation the agent

had talked about how important it was to, *inter alia*, ask about the child's healthcare provider and get their medical records - something he had not done here. RP 1009-15. The agent's presentation had also recommended taking computers into custody and indicated that there were people at the police station who could help process them. RP 1045. The materials also recommended collecting bedding where alleged sex acts occurred, something else the agent had not done in this case. RP 1020-25. Agent Holladay speculated that Fritz would have washed his sheets, as it appeared the towels were washed daily. RP 1020-45. The agent did not try to secure L's sheets. RP 1020-45.

L, who was almost 16 years old at the time of trial, first testified that she had liked Fritz and thought he was nice before the finally admitting she did not like him much. RP 1071-77. She described the sexual contact as including his hands touching all over, his penis touching her privates, his mouth on her privates and her mouth on his penis. RP 1080-81.

L said it was the same every time. RP 1083. He would call her to come into the bedroom and would be naked, then he would take off her clothes, "play adult movies and forcefully try to put his private parts" in her bottom. RP 1083-84, 1122. L said the adult movies showed a guy and a girl having intercourse but did not remember if the people were always the same. RP 1083-87. L said he had tried to put his penis in her butt and she had felt pain but he was not able to get it in. RP 1085. She also said if she yelled that she was going to puke or poop he would stop. RP 1087.

L also recounted being in her bedroom at night when he would come in wearing his robe, naked underneath, and say “good night,” then lay on her and move his robe so his penis was on her bottom. RP 1089. Nothing further happened and she thought this happened less than 10 times. RP 1090. L said another time he came in wearing the robe, asked her to open it, then made her mouth touch his penis. RP 1091. She remembered her lips on it but did not remember if it went into her mouth. RP 1090-91. She did not remember it happening more than once. RP 1091.

L also recounted having him give her the option of watching him bathe or him watching her bathe, but did not think there was any touching then. RP 1093. She said nothing else happened in the bathroom that she could recall. RP 1093-94.

L thought her memory about events was better now, years later, than it was at the time of the incidents. RP 1104. She was older now, she said, and she “had more time to think about this.” RP 1104. She conceded that, at one point, she had told investigators that Fritz had never put his penis in her, ever. RP 1129-30.

At trial, L would claim that she did not tell anyone because, *inter alia*, “[h]e threatened to kill my mom and grandma.” RP 1094. Ms. Luce was clear that L never said anything about Fritz threatening to kill anyone. RP 1450. Ms. Pack similarly heard no such threats, nor did the agent. RP 982-85, 1344.

L told the defense investigator that when she was six years old Fritz used to force her to smoke cigarettes and punish her if she

refused. RP 1109-10. She also told the investigator that she used to hit Fritz and fight him every time, once for about 20 minutes. RP 1111-12. But she told a detective to the contrary that when he put his mouth on her vagina and performed oral sex it tickled and she laughed. RP 1114. At trial, she did not recall telling anyone that. RP 1114.

L testified that sometimes she would run and lock herself in the bathroom and wait for her mom to get home. RP 1111-12. She also said she sometimes tried to run away and get to the house of the neighbor, who babysat her a lot. RP 1112. At trial she said she never got to the neighbor's. RP 1144-45. She did not recall saying to the contrary prior to trial. RP 1145. She testified she would sometimes scream for help when trying to fight Fritz off and could not explain why, if he threatened to kill people if she told, she would have yelled for help. RP 1112.

L did not remember telling her grandmother that the first time was in the bathroom at the apartment. RP 1117. She did not remember telling the agent it had been at the apartment but not in the bathroom. RP 1117-22. She was sure nothing ever happened at the apartment. RP 1117-22. Instead, the first time it happened was at the house. RP 1119-34.

For the first time, she now said the first time she had freaked out and pushed him off her. RP 1119-34. She said he ran into the garage and she followed, confronting him. RP 1119, 1133. L testified that Fritz then apologized and said, "that shouldn't happen." RP

1133-34. She admitted she never told anyone about this until just before trial. RP 1117-19, 1134-37.

The audio of L's testimony at age nine (from the first trial) was played for jurors. RP 1049-1065. In it, then-trial prosecutor Anna Klein asked L what happens if she told a lie, L responded, "[t]hen they'll believe it and then it won't - - it will be a lie because it won't sound right." RP 1051. She promised, however, to tell the truth. RP 1051.

L could not say what state she lived in or the name of the town in which she lived. RP 1052-53. When asked why she was there, she answered that Fritz had "child molested her," then said he had "s-e-x" with her by putting his "weiner" inside her bottom and trying to stick it in her front part. RP 1057. She said it hurt and he also used his tongue on her private parts. RP 1058. She said it happened at the apartment and at the home, in the bathroom and his room and hers. RP 1059. She said he told her if she told she would be under a bridge and have no home. RP 1061. She also said there was a "little video" that he would show and try to do with her. RP 1062. L was clear, however, that she never saw anything come out of his "weiner." RP 1063-64. She also said she never saw him touch himself and she never made him touch her anywhere. RP 1064.

Pediatric nurse practitioner Marsha Stover saw L on April 22, 2010. RP 1166-75. Ms. Stover got a referral about L and reached out to arrange the exam. RP 1169-70, 1224-25. The purpose was to do a

medical exam of the child's overall health but Stover worked only with kids who alleged sexual abuse. RP 1171.

Although she conducted such examinations from about 2008 through 2012 and saw "over a hundred, maybe 150" children, Stover admitted that she had only a few classes in interviewing. RP 1171-72.⁴ The nurse practitioner thought, however, that she had used open ended questioning. RP 1241. And she said her hours with L were not a "forensic interview[.]" RP 1237-42.

After talking to Pack and learning the accusations, Stover did a head-to-toe physical on L, finding nothing abnormal; L had a normal hymen and anus, no lacerations, scars or lesions, and no discharge or injuries. RP 1227-30. Next, Stover moved to questioning L about the accusations. RP 1210-12. L told Stover she moved to a new school and she said she had to because it was too close to "Bruce," meaning Fritz. RP 1210-12. Ms. Stover asked, "who's Bruce," and L said he was the "one that this is about." RP 1212. With further inquiry, L told Stover he did "grown-up stuff" with her, "s-e-x." RP 1214. When Stover asked what L meant by "s-e-x," L just looked at her and said nothing. RP 1214. Ms. Stover asked, "what happened to you," L said, he "tried to stick his weiner in." RP 1215.

The nurse practitioner through questioning that it started happening when L was six, that he tried to "go up and down" on her, that he had tried to spit on his "weiner," that he had moved his

⁴Outside of the presence of the jury, she would admit she had no training in proper forensic interviewing of children. RP 1184.

hands up and down, that he put his hands on it and rubbed, that he said “relax, it won’t hurt,” and other claims. RP 1215-32. After each disclosure, Stover would follow up asking for more, using questions like, “what else happened?” RP 1215-1232. With such prompts, Stover elicited that he tried to kiss L, tried to lick all over L’s body but actually her legs and her privates, tried to smack her on the bottom and say “good girl” because he knew she did not like it, that he does stuff to her mom but also to her when mom was out, and that he said if she told she would not have a family and would be “under a bridge.” RP 1215-22, 1230. Ms. Stover did not ask how L knew that he did these things with her mother. RP 1230-31. L even told Stover something she said she had forgotten to tell the police: that she had tried to kick his privates but he had smacked her in the head. RP 1218-19.

L never said anything to Stover about watching DVDs, or acting out porn, or anything similar. RP 1227-31.

Dr. Susan Preston, a licensed psychologist, saw L in 2010 and again in 2014. RP 1410-11. In 2010, L was reportedly suffering symptoms of bed-wetting and not wanting to sleep in her own bed, but also that was “back-talking” to her mom. RP 1412. L was apparently afraid at night that her stepdad was going to break into the house. RP 1412-13. Her treatment goals were for L to be able to sleep in her own bed, to stabilize her eating and appetite, to stabilize her mood, to “be able to talk about the sexual abuse,” and “to get her to stop the whining, complaining and back-talking.” RP 1413.

L did not specifically talk about the details of the allegations or even her feelings about them with Preston. RP 1414-15. But she did say that Fritz “had ‘child molested’ her, that he was a mean person,” and had “yelled in her face.” RP 1415.

Bruce Fritz testified on his own behalf. RP 1462. He was clear that he never raped or molested L and never told Pack to the contrary. RP 1464. The prosecutor elicited that Fritz had spanked L but not hit her on her body to discipline. RP 1470.

Mr. Fritz was convicted of counts 1, 2 and 5 (and enhancements), and acquitted of counts 3, 4 and 6. RP 1627-29. The relevant conduct relied on by the state for the convictions was as follows: Count 1 -acting out pornography in the bedroom (RP 1614); Count 2- conduct in the bathroom (RP 1619-20); and Count 5 - saying “good night” in her bedroom and having his penis against her bottom (RP 1627-28). The jurors entered explicit “not guilty” findings for Count 3 - the claim of him licking her vagina and it tickling (RP 1622-23); Count 4 - the claim he had opened his robe and made her perform oral sex in the bedroom (RP 1624-25); and Count 6 - the claim that he had committed the crimes “more than six times” and there were many other incidents for which jurors should convict. RP 1627-29.

D. ARGUMENT

1. COUNSEL WAS PREJUDICIALLY INEFFECTIVE

Both the state and federal constitutions guarantee the accused effective assistance of counsel. See State v. Thomas, 109 Wn.2d 222,

225-26, 743 P.2d 816 (1987); Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); Art. 1, §22; Sixth Amend. Counsel is ineffective when his performance falls below an objective standard of reasonableness and that deficiency prejudices his client. Thomas, 109 Wn.2d at 229. Reversal is required where there is a reasonable probability that, but for counsel's unprofessional errors, the result would likely have been different. See State v. Aho, 137 Wn.2d 736, 745, 975 P.2d 512 (1999).

In this case, counsel was prejudicially ineffective in handling the issue of L's precocious sexual knowledge. Further, his failures resulted in the exclusion of evidence which was material, relevant and necessary, in violation of his rights to present a defense.

a. Relevant facts

Prior to trial, Fritz moved for discovery of records from the Oregon Department of Health, which had investigated L's biological father, Dammien Fowler, for alleged sex abuse while Fowler lived with or had access to L. CP 289-90 Mr. Fritz argued, *inter alia*, that evidence regarding such claims against Fowler could be highly relevant to explaining L's precocious sexual knowledge. CP 297; RP 560-70; Sealed CP (transmitted by trial clerk). After he got those records, the state moved to preclude Fritz from presenting any evidence "implicating another." CP 351.

In court, counsel noted that Fowler had been accused of having molested the child of a woman with whom he was living only a few months after L's allegations were raised. RP 804-806. Mr. Fowler

had also disclosed having been charged with molesting his own sister. RP 804. There was an investigation in Oregon but no charges filed. RP 804-805. Counsel argued the evidence was relevant and *inter alia* that its exclusion violated Fritz's rights to present a defense. RP 805-806.

The trial court initially reserved ruling. RP 807. A little later, however, the prosecutor told the court that L had not had contact with her biological father from about age two or three until the time of the first trial, when she was about nine. RP 864-65. In fact, the prosecutor declared, the prior trial was what had brought Fowler back into L's life. RP 865. Counsel disputed these claims, noting there was evidence of contact in the records from Dr. Preston, which had L saying she did not like Fowler, that he made her uncomfortable, and that he yelled at her when they went fishing if she did it "wrong." RP 864-67. In excluding the evidence, the court explicitly relied on the absence of any evidence that Fowler had contact with L before the allegations were raised. RP 868-89. The court made it clear it would reconsider if there was evidence such contact had occurred. RP 869.

At trial, Pack testified about contact between L's biological dad, Damian Fowler, and L. RP 1352. She said that Fowler had always tried to get visitation. RP 1352-53. Ms. Pack denied that the case against Fritz had somehow brought Fowler more into L's life. RP 1353. She also said that L had some visits with her dad even before L raised her claims against Fritz. RP 1353.

It was counsel who elicited this testimony on cross-

examination. RP 1353. The prosecutor followed up by establishing that L had not seen her dad for some time before L raised her claims. RP 1365. But Pack could not recall how old L was at the time of that last contact. RP 1365.

Despite this testimony indicating that Fowler had access to L before the allegations were raised, counsel did not ask the trial court to reconsider its ruling excluding the evidence of the accusations against Fowler, on any grounds.

At trial, the proecutor elicited from L that she learned the word “sex” from Fritz. RP 1096. Ms. Pack testified that she had never described sex acts or ejaculation or anything similar to L. RP 1334. In initial closing argument, the prosecutor told jurors that a child like L would not know the kind of details about sex if she had not “lived this.” RP 1631. The prosecutor also declared that L could not have gotten such detail from just watching pornography. RP 1631. In part, the prosecutor said, this was because L described “how it felt,” but also because she had described things the prosecutor said were not consistent with what she would have seen on pornography. RP 1631-32.

Then, in rebuttal closing argument, the prosecutor again returned to the idea that jurors should find guilt because of L’s precocious sexual knowledge. She relied on the testimony that L learned the word “sex” from Fritz. RP 1698. The prosecutor also argued that jurors had to ask themselves, “if the Defendant didn’t do these things to L[], where did she learn about all this[?]” RP 1700.

The prosecutor also told the jurors that L was an eight-year-old girl, with no other access to sexual materials. RP 1705-1706. A few moments later, in arguing that L did not have a motive to make up all of the claims, the prosecutor asked a hypothetical, “even if those reasons made any sense for this eight year old girl to make up years of sexual abuse, even if we accepted the premise **that she suddenly knew how to make this up and describe things in this way,**” L had no motive to do so. RP 1709-10 (emphasis added).

b. Counsel was prejudicially ineffective

Counsel was prejudicially ineffective in his handling of the evidence, both at trial and in closing argument. In general, counsel’s effectiveness is determined based on the entire record, with a strong presumption that counsel’s conduct is not deficient. See State v. McFarland, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995); Strickland, 466 U.S. at 691. Counsel’s performance is deficient if it falls below an objective standard of reasonableness. See State v. Boyd, 160 Wn.2d 424, 434, 158 P.3d 54 (2007); Strickland, 466 U.S. at 690-91.

Here, counsel’s performance meets that standard. After first arguing on several grounds that evidence regarding Fowler’s troubling history of accusations of child sexual abuse was important to his client’s case, counsel then failed to follow through. The trial court’s ruling was explicitly based on the court’s belief that the prosecutor was correct and there was no evidence of any contact between Fowler and L for years prior to the allegations being raised. RP 868-69. Further, the court specifically declared that it would reconsider its

ruling evidence developed to the contrary. RP 869.

Yet after counsel elicited from Pack that there was, in fact, such contact, counsel did not raise the issue. See RP 1353-65. Even after the state tried and failed to get Pack to say the contact had occurred after the claims were raised, counsel stayed mute.

As a result, the prosecution was able to imply that L's precocious knowledge of sexual terms and acts was evidence of Fritz's guilt - that she would not know such details about sex if she had not "lived this," that she was an eight-year-old girl with no other access to sexual materials to explain that knowledge besides Fritz's guilt, that "if the Defendant didn't do these things to L[], where did she learn about all this[?]" RP 1631-32, 1698, 1700, 1705-06, 1709-10. And because of counsel's unprofessional failures, the jurors never heard the evidence which would have given an alternate explanation for L's "precocious knowledge" - one which did not support Fritz's guilt.

Counsel's failure to raise the issue again after it became clear that Fowler had access to L *before* the allegations was ineffective. Even the strong presumption of reasonableness falls where there is no conceivable tactical reason for counsel's acts - or failures. Aho, 137 Wn.2d at 745. Counsel himself recognized the implications for Fritz's constitutional right to present a defense. RP 805-806. Further, the court specifically said it would reconsider if there was evidence Fowler had been with L prior to the claims being raised. RP 868-69. There could be no reasonable tactical reason to fail to continue to pursue admission of this highly relevant evidence, especially in a case

where there is no physical evidence.

In addition, counsel's failure to renew the request to admit the evidence resulted in a violation of Fritz's state and federal due process rights to present a defense. Because of the nature of child sex abuse cases, the existence of accusations alone are likely to arouse great sympathy in jurors, who presume that a child would be innocent of sexual matters in the normal course. See State v. Peterson, 35 Wn. App. 481, 485-86, 667 P.2d 645, review denied, 100 Wn.2d 1028 (1983). As a result, a child's testimony showing precocious knowledge of sexual acts or terminology is realistically seen by jurors as evidence of the defendant's guilt in a child sex case. See State v. Hunt, 48 Wn. App. 840, 848-50, 741 P.2d 566, review denied, 109 Wn.2d 1014 (1987).

Put another way, jurors will "logically could draw the inference" that a child victim was "conversant with such things only because defendant was guilty as charged." State v. Carver, 37 Wn. App. 122, 124-25, 678 P.2d 842, review denied, 101 Wn.2d 1019 (1984). And here, the state argued not just that the child should be believed because she described how it felt but also because of her precocious knowledge. RP 1631-32, 1698-1701 ("if the Defendant didn't do these things to L[], where did she learn about all this[?]", 1705-1706 (child had no other access to sexual materials), 1709-10 (questioning the reasonableness that L "suddenly knew how to make this up and describe things in this way"), RP 1716-17.

Where, as here, there is evidence of a potential alternative source for precocious sexual knowledge, that evidence is extremely

relevant to the defense. Under state and federal due process, the accused has as constitutional right to present a defense. See State v. Hudlow, 99 Wn.2d 1, 15-16, 659 P.2d 514 (1983); Chambers v. Mississippi, 410 U.S. 284, 294, 93 S. Ct. 1038, 35 L. Ed 2d 297 (1973); 14th Amend.; Art. 1, §22. Put another way, “[t]he right of an accused in a criminal trial to due process is, in essence, the right to a fair opportunity to defend against the State’s accusations.” Chambers, 419 U.S. at 294.

The right to present a defense is not unlimited and a defendant has no right to present irrelevant evidence. See State v. Jones, 168 Wn.2d 713, 720, 230 P.3d 576 (2010). But the threshold for relevance is low. See State v. Darden, 145 Wn.2d 612, 622, 41 P.3d 1189 (2002). Evidence is relevant if it has “*any* tendency to make the existence of any fact that is of consequence to the determination of an action more probable or less probable than it would be without the evidence.” ER 401 (emphasis added). If evidence is of even minimal relevance to the defense, the burden shifts to the state to prove that its exclusion is required because its admission would so “disrupt the fairness of the fact finding process at trial.” Darden, 145 Wn.2d at 622.

Further, where evidence is of high probative value, “it appears no state interest can be compelling enough to preclude its introduction consistent with the Sixth Amendment and Const. art. 1, § 22.” Hudlow, 99 Wn.2d at 16.

Trial counsel was already aware of the potential implications of the evidence for Mr. Fritz’s right to present a defense - he had argued

it. And he was also aware of the implications for precocious knowledge - he had argued that, too, albeit spending most of his energy on a failed theory of admission under “other suspects” doctrine. RP 805-806; see e.g., State v. Downs, 168 Wash. 664, 667, 13 P.2d 1 (1932) (admission of “other suspects” evidence requires “a train of facts or circumstances as tend clearly to point out” another).

Counsel was prejudicially ineffective in failing to ask the trial court to reconsider and allow evidence of Fowler’s access to L. Without that evidence, the state was free to claim to the jury that L’s precocious sexual knowledge was proof of Fritz’s guilt. Further, denial of a claim of the right to present a defense is reviewed de novo. Jones, 168 Wn.2d at 719-20. If counsel had asked for reconsideration and that request had been denied, that ruling would have been reviewed by this Court under that heightened standard of review. See Jones, 168 Wn.2d at 719; see State v. Iniguez, 167 Wn.2d 273, 280-81, 217 P.3d 768 (2009). And where the exclusion of evidence violates the right to present a defense, the error is presumed prejudicial and reversal is required unless the state can show, beyond a reasonable doubt, that the constitutional error was “harmless.” See State v. Franklin, 180 Wn.2d 371, 382, 325 P.3d 159 (2014). The state would not have been able to meet this standard, as evidence of guilt here was not so overwhelming that, absent the error, every reasonable jury would have convicted - as the three acquittals make clear. See State v. Watt, 160 Wn.2d 626, 635, 160 P.3d 640 (2007).

Notably, it is misconduct for the prosecution to first move to

exclude evidence and then rely on its absence in arguing guilt. See State v. Kassahun, 78 Wn. App. 938, 900 P.2d 1109 (1995).⁵

Reversal is required based on counsel's unprofessional errors if there is a "reasonable probability" that the outcome of the proceeding would have been different had those errors not occurred. State v. Reichenbach, 153 Wn.2d 126, 130, 101 P.3d 80 (2004). A "reasonable probability is a probability sufficient to undermine confidence in the outcome." Strickland, 466 U.S. at 694. There is more than such a probability here. The entire case rested on credibility. The state explicitly relied on the false premise that the only way that L could have the precocious sexual knowledge she displayed as a nine-year-old was if she was telling the truth and Fritz had repeatedly raped her. The trial court had given counsel a clear chance to reopen the issue if evidence surfaced of Fowler having access to L during the relevant time. Counsel's failures here allowed a crucial part of the state's case against his client to go unchallenged - in a case where there was no physical evidence and serious questions about the state's claims.

Trial counsel's performance fell below an objective standard of reasonableness and his failures prejudiced his client. Mr. Fritz was deprived of his state and federal rights to effective assistance. This Court should so hold and should reverse.

2. THE PROSECUTOR COMMITTED FLAGRANT,
PREJUDICIAL MISCONDUCT AND COUNSEL WAS
AGAIN INEFFECTIVE

Unlike other attorneys, prosecutors enjoy a special role as

⁵This issue is discussed in the section on misconduct, *infra*.

“quasi-judicial” officers. Berger v. United States, 295 U.S. 78, 88, 55 S. Ct. 629, 79 L. Ed. 2d 1314 (1935), overruled in part and on other grounds by Stirone v. United States, 361 U.S. 212, 80 S. Ct. 270, 4 L. Ed. 2d 252 (1960); State v. Clafin, 38 Wn. App. 847, 850, 690 P.2d 1186 (1984), review denied, 103 Wn.2d 1014 (1985). As a result, they owe the public a duty to seek justice instead of acting like a heated partisan, even if it means “losing” a conviction. In re Glassman, 175 Wn.2d 696, 712-13, 286 P.3d 673 (2012); State v. Reeder, 46 Wn.2d 888, 892-93, 285 P.2d 884 (1955). Further, the “public” includes the accused. Glassman, 175 Wn.2d at 713. Where a prosecutor fails in those duties it may deprive the accused of his due process rights to a fair trial. See Donnelly v. DeChristoforo, 416 U.S. 637, 94 S. Ct. 1868, 40 L. Ed. 2d 431 (1974).

In this case, this Court should reverse and remand for a new trial, because the prosecutor committed flagrant, prejudicial misconduct below which could not have been cured by instruction. In the alternative, if the prejudice could have been cured by instruction, counsel was again prejudicially ineffective.

a. Relevant facts

In initial closing argument, the prosecutor told jurors that the state had “sort of an additional hurdle” in this kind of case, “because people don’t want to believe that this type of thing happens at all.” RP 1604. She framed her job as including making jurors “believe and understand” that child sex abuse happened, despite how “tempting” it was to “look for other explanations,” to “believe she made it up or

believe that someone told her to say these things. RP 1603-04.

In contrast, the prosecutor told jurors, the defense was going to ask jurors to discount everything L said because of inconsistencies in her versions of events, and that the defense will say “it means you can’t believe her.” RP 1644, 1646-50. The prosecutor returned to this argument in rebuttal, accusing counsel of telling jurors the defense was asking them to find that L was making everything up. RP 1696.

The prosecutor then emphasized that “beyond a reasonable doubt” focused on “reasonable” doubts. RP 1696. The prosecutor faulted the “standard” defense wanted to apply to the case, declaring, “[i]f we expect L[] to remember every single time that the Defendant violated her, every single detail of it, what standard would we be holding her to?” RP 1706. The prosecutor also told jurors that they would have to find that L was making it all up to disbelieve L’s story - and that the defense was asking them to so find. RP 1704-05.

The prosecutor moved on to motive, mocking the “idea that she made this up because of her bedtime,” asking jurors, “is that reasonable?” RP 1714. She then declared, “[i]t does have to be reasonable.” RP 1714.

The prosecutor next turned to questioning what “benefit” L would get from lying or making up false claims:

Did she look like she wanted to be here? Did she look like she enjoyed this? What did this family get out of this, especially seven years later? What possible benefit could they have to come here and tell you that these things happened like they did?

TRP 1715. A moment later, the prosecutor went on, focusing on what

L had gone through in the criminal justice process:

[L] has had to talk about this to so many people. She had to get a medical exam, she had to move out of the house that she was living in, she (inaudible) to strangers and talk to them about sexual things. This 15-year-old girl. And you saw her on the stand. Did she look like she wanted to be here? Did she look like she enjoyed this? What did this family get out of this, especially seven years later? What possible benefit could they have to come here[?]

RP 1714-15. The prosecutor went on:

L[] had to have interview after interview. She had to have a medical exam that you heard was uncomfortable. . . Then she had to come here seven years later, a 15 year old girl, and talk to all of you about these things. And she had to sit up there for an hour and a half and answer questions.

Now through that time, [defense counsel] got to her but she was up there for an hour and a half being asked about every statement she had ever made about abuse she endured for over - - for about two years. And even then at the end, after she had been asked about every statement, everything that could be thought of, she still was very adamant. [Defense counsel] said did this happen and she said it did.

Beyond a reasonable doubt means you have an abiding belief in the truth of the charges. **There is no reasonable explanation for her to have made this up. Everything that she said in those tapes, is something that she had to experience to describe.**

RP 1715-16 (emphasis added). The prosecutor then exhorted jurors to use their “common sense” and said if they did they would see the only reasonable explanation for L making the claims was that the crimes had occurred. RP 1716.

b. These arguments were prejudicial misconduct

With these arguments, the prosecutor committed flagrant, ill-intentioned and prejudicial misconduct. It is misconduct for prosecutor’s to employ arguments “calculated to inflame the passions

and prejudices of the jury.” Glassman, 175 Wn.2d at 704. While a prosecutor enjoys “wide latitude to argue reasonable inferences from the evidence,” they must still ensure that they seek conditions only based on evidence and reason. See State v. Castaneda-Perez, 61 Wn. App. 354, 363, 810 P.2d 74, review denied, 118 Wn.2d 1007 (1991). Further, it is misconduct to draw a negative inference from exercise of a constitutional right, including the rights to go to trial, to have counsel and to cross-examination. See e.g., State v. Thierry, Jr., 190 Wn. App. 680, 694-95, 360 P.3d 940 (2015), review denied, 189 Wn.2d 1015 (2016). It is also improper to malign counsel or his role by suggesting that he is urging jurors to improperly disregard testimony. See id.

Here, the prosecutor strayed from the initially permissible argument that L had no motive to make up allegations to impermissible attempts to invoke sympathy and bolster her testimony based on what she had to go through because Fritz exercised his rights. The prosecutor did not just argue that the defense points were not reasonable; counsel was painted as having “got to” L for cross-examining her. L was described as having to go through interview after interview, then having to come testify, in front of jurors, about sexual things, and worse, “she had to sit up there for an hour and a half and answer questions.” RP 1715-16.

Then, after already describing counsel as having “got to” the 15-year-old, the prosecutor again invoked sympathy for L having to answer questions about the statements she had made, “every

statement, everything that could be thought of,” again suggesting defense counsel had done something improper.

Notably, before making these comments, the prosecutor had suggested that it was somehow unfair for the defense question L’s claims despite the serious inconsistencies by asking, “what standard would we be holding her to” by asking her claims to be consistent and for her to remember details sufficient to support them. It is highly improper to suggest that the defense is trying to get jurors to declare that the word of a child is not enough. Thierry, Jr., 190 Wn. App. at 688, 690. The prosecutor’s comments here invoked the same idea; that questioning L based on the inconsistencies or lack of memory would somehow be an impossibly high or unfair standard.

These arguments were improper attempts by the prosecutor to bolster L’s credibility by invoking juror sympathy. Cases involving claims of child sex abuse are already highly charged with emotion, given their very nature. Into that mix, the prosecutor threw a match. Further, in so doing, she ultimately shifted the burden of proof. She mocked the idea that L would make up allegations because she was angry at her bedtime, asking if that was reasonable. RP 1714. But she went further, telling jurors at the very end of rebuttal argument that there was “no reasonable explanation for [L] to have made this up,” that jurors should use their “common sense” and that they should see the only “reasonable explanation” was guilt. RP 1715-16.

The presumption of innocence is “the bedrock upon which the criminal justice system” rests and misstating the corresponding burden

of proof beyond a reasonable doubt is serious error. See State v. Bennett, 161 Wn.2d 303, 315, 165 P.3d 1241 (2007). Indeed, the issue of how to define the burden of proof is fraught with issues and the state Supreme Court has cautioned prosecutors against the “temptation to expand upon the definition of reasonable doubt,” because of the risk of diluting the presumption of innocence and the prosecutor’s constitutional duty. Bennett, 161 Wn.2d at 317-18. The proper burden of proof is that prosecutors must prove every part of their case beyond a reasonable doubt and jurors must presumptively acquit unless and until that burden is met. See State v. Wright, 76 Wn. App. 811, 826, 888 P.2d 1214, review denied, 127 Wn.2d 1010 (1995). Jurors did not have to find a “reasonable explanation” for why L had made up the claims - nor did the defense have to provide one. Jurors were not there to solve the question of why a child would make up a false accusation or to rebut L’s claims; that was not their role. The prosecutor’s misconduct not only invoked sympathy for and bolstered L, it improperly suggested that jurors had a duty they did not have and further that Fritz had to show a reasonable explanation for L’s claims.

If there is a timely objection below, the issue is whether there is a substantial likelihood that the misconduct affected the jury’s verdict. Glassman, 175 Wn.2d at 704. But counsel did not object below. As a result, counsel is deemed to have “waived” the issue for his client unless the misconduct is so ill-intentioned, flagrant and prejudicial that it could not have been cured had counsel objected and sought a curative instruction below. See Bennett, 161 Wn.2d at 317-18. The issue

is whether the prosecutor's arguments were such that there is an "enduring and resulting prejudice" which is incurable and requires a new trial. See State v. Fisher, 165 Wn.2d 727, 747, 202 P.3d 937 (2009).

Here, the only issue was L's credibility. The prosecutor's comments invoked strong emotions and prejudice in a trial already fraught with such issues already. Counsel was denigrated and faulted and implied to have acted improperly for doing his job and jurors were told that requiring L to remember or testify consistently would be to hold her to a fair standard. Finally, jurors were told there was no reasonable explanation to explain away L's testimony and to decide based on "common sense." It is appellant's position that these arguments were so corrosive to fairness and so pervasive in their seduction that no juror could have followed an instruction to disregard.

Even if the Court disagrees, however, reversal should still be granted, because counsel was again prejudicially ineffective. Counsel's failure to object to these arguments fell below an objective standard of reasonableness. Worse, counsel appears to have himself repeatedly misstated the burden of proof the state had to carry. He told jurors that the standard was not something you use in your everyday lives about things like what to cook for dinner or whether to buy a new car, but rather "convinced sufficiently to make one of the most important decisions of your lives[.]" RP 1661. He also told jurors that all they needed was "one reason to doubt," then argued issues with the case that gave them such a "reason." RP 1669-96. He said the lack of

physical evidence was “reason to doubt” or “reason for you to acquit.” RP 1674. He also told jurors to use their “common sense” and knowledge of human nature. RP 1682. He told jurors that L’s statements gave them “reasons to doubt,” and “things the prosecutor has to answer in this case for you to get over this reasonable doubt hurdle.” RP 1683-84. He also told jurors they only needed “one reasonable doubt.” RP 1964-95. And he framed it as whether there were “many, many, many reasons to doubt” and said jurors could not find Fritz guilty unless the state explained some of the concerns he had raised “to a degree of certainty that convinces you beyond a reasonable doubt.” RP 1695.

Jurors do not have to find a “reason to doubt” the state’s case. State v. Venegas, 155 Wn. App. 507, 520, 228 P.3d 813, review denied, 170 Wn.2d 1003 (2010). Indeed, such argument implies that jurors have an initial affirmative duty to convict, with the corresponding suggesting that the accused must provide “such a reason to the jury in order to avoid conviction.” See State v. Anderson, 153 Wn. App. 417, 431, 220 P.3d 1273 (2009), review denied, 170 Wn.2d 1002 (2010).

It is assumed that counsel will render adequate assistance by making decisions with the exercise of reasonable professional judgment. McFarland, 127 Wn.2d at 322. There is no reasonable tactical reason to argue the *wrong* standard of the law and thus minimize the burden of proof the state faces in proving your client’s guilt. There is also no legitimate tactical reason to fail to object when the state misstates the law and its burden and invokes improper

emotion in an already highly emotional charged trial. This Court should so hold and should reverse.

c. Further misconduct

The prosecutor also committed flagrant, prejudicial misconduct in closing argument by relying on L's precocious sexual knowledge as evidence of guilt. It is misconduct to successfully move to exclude evidence and then rely on its absence in arguing guilt. Kassahun, 78 Wn. App. at 946. There would have been no misconduct in the state's arguments on this point had Pack not testified that Fowler had access to L prior to the claims being raised. In that situation, the implication that precocious sexual knowledge was evidence supporting guilt would be logical - and lawful. See Carver, 37 Wn. App. at 124-25.

But once Pack had testified about that access, the prosecutor knew that there was another possible way for L to have acquired precocious knowledge. As a quasi-judicial officer, a prosecutor must not argue for jurors to draw inferences it knows or should have known are actually untrue. See State v. Weiss, Jr., 752 N.W.2d 372, 393, 312 Wis. 382 (2008); see also United States v. Toney, 599 F.2d 787, 790-91 (6th Cir. 1979) ("foul play" for a prosecutor to argue a defense is not credible because of lack of evidence when prosecutor successfully excluded (and thus knows of) evidence which would have supported that defense). It is misconduct for a prosecutor to urge jurors "to draw an inference" which is false. See State v. Bvocik, 781 N.W.2d 719, 720, 324 Wis.2d 352 (2010).

Thus, in Kassahun, the defendant claimed self-defense and tried

to get evidence relating to gang activity around the site of the crime, a store he part owned. 78 Wn. App. at 946. He also sought evidence about the gang association of the victim and crucial state witnesses. 78 Wn. App. at 946. The prosecutor first succeeded in preventing Kassahun from securing the evidence, then got the trial court to preclude the defense from mentioning gangs and gang activity - even though the defense was self-defense. 78 Wn. App. at 946.

At trial, Mr. Kassahun testified about his fears the store had been “plagued by gangs” and detailed having to clean up needles. 78 Wn. App. at 946-47. He also testified about having his life threatened by a gang member and having police dismiss it as not a “real emergency.” Id. Then, in closing argument, over objection, the prosecutor mocked Kassahun’s testimony as trying to “paint a picture of lawless gangs taking over and running the show,” but asked jurors, “where was the evidence of that?” Id.

Those argument were misconduct. 78 Wn. App. at 952. The prosecutor had told jurors to find the defense less credible based on the absence of evidence the prosecutor prevented him from acquiring. Id. Because it was already reversing based on other error, the court did not decide whether the misconduct alone prejudiced the right to a fair trial. Id. But the court made a point to direct such misconduct should not recur. Id.

Here, once Pack testified that Fowler had always wanted access to L and *had* such access it prior to the claims being raised, the prosecutor knew or should have known that it was simply not true that

L could only have precocious sexual knowledge if Fritz was guilty. There was an alternate explanation - one jurors did not hear. That was due to counsel's ineffective failures, as argued, *infra*.

But the prosecutor still argued that jurors should find L more credible in her accusations against Fritz because of not only the details she gave in her testimony but also on the precocious sexual knowledge L showed. RP 1631 (would know know these details about sex if she had not "lived this," referring to the alleged crimes), 1631-32 (what she said he did and said were not "consistent with what she would have seen on pornography"), 1698 (emphasizing that L learned the word "sex" from Fritz), 1700 (jurors had to ask themselves, "if the Defendant didn't do these things to L[], where did she learn about all this[?]"). 1705 (arguing L had no other access to sexual materials to explain her knowledge), 1709-10 (dismissing the idea that the eight-year-old girl "suddenly knew how to make this up and describe things in this way), 1716-17.

At the time she made these arguments, the prosecutor knew that, in fact, there was a potential alternate explanation for L's precocious sexual knowledge - one which had nothing to do with Fritz's guilt. Just as it was wrong for the prosecutor in Kassahun to argue that the defense was less credible because of a lack of evidence to support it when the prosecutor *knew* such evidence might exist, here the prosecutor was wrong to urge jurors to find L's claims that Fritz had abused her more credible because L had precocious sexual knowledge which the evidence did not otherwise explain.

This misconduct was prejudicial, ill-intentioned and flagrant. The decision in Kassahun was well before this trial. Kassahun, 78 Wn. App. at 938. Thus, the prosecutor was on notice that it was improper to urge jurors to come to an improper conclusion based on evidence the state knows about but jurors do not see. See, State v. Fleming, 83 Wn. App. 209, 214, 921 P.2d 1076 (1996). Further, this Court has found misconduct flagrant, ill-intentioned and prejudicial even if it was not previously so declared. State v. Johnson, 158 Wn. App. 677, 685, 243 P.3d 936 (2010), review denied, 171 Wn.2d 1013 (2011).

The prejudice here was strong. As the Court noted in granting Fritz's PRP, the only issue was credibility. CP 201-215. The jurors already had significant questions about the state's case, as evidenced by their having not just acquitted but actually declared Fritz "not guilty" of three of the counts for which the state sought conviction. The prosecutor repeatedly urged jurors to rely on L's precocious sexual knowledge as evidence of Fritz's guilt despite knowing there was evidence which could suggest the knowledge came from Fowler, not Fritz. It is difficult to conceive of a curative instruction which could erase the linkage between L's precocious sexual knowledge and Fritz, especially given the highly emotional nature of the accusations and the natural propensity of jurors to assume children are sexually innocent and unaware. See, e.g., Hunt, 48 Wn. App. at 849-50. Without another explanation, jurors here were left with the stark facts of a nine-year-old girl knowing sexual terms and acts which would she presumably would not know, unless the defendant had committed the

charged crimes. Carver, 37 Wn. App. at 124-25.

Indeed, that was the very argument the prosecutor here made. See RP 1698-1701 (“if the Defendant didn’t do these things to L[], where did she learn about all this[?]”).

Not only did counsel fail to move to have the trial court admit the evidence once Pack confirmed that Fowler had access to L at the relevant time (as argued, *infra*), counsel failed to object when the prosecutor urged jurors to rely on L’s precocious sexual knowledge as showing Fritz’s guilt. See RP 1631-32, 1698-1717. Counsel was again prejudicially ineffective. Notably, Mr. Fritz already had a trial with counsel failing to object to or properly handle misconduct, as well as a first appeal. See CP 201-15; In re the Personal Restraint of Fritz, 192 Wn. App. 1030 (2016) (unpublished).

3. THE TRIAL COURT ABUSED ITS DISCRETION IN ADMITTING BOLSTERING EVIDENCE OF PRIOR CONSISTENT STATEMENTS WHICH WERE HIGHLY PREJUDICIAL AND INADMISSIBLE

Reversal and remand for a new trial is also required because the trial court erred in admitting statements L made to Dr. Preston, the therapist, under the hearsay exception for statements made for purposes of medical treatment and diagnosis.

a. Relevant facts

Before trial, counsel objected to admission of testimony from Dr. Preston about what L said in treatment in 2010 and 2014, objecting that it involved more than just the alleged abuse and was not admissible as statements made for “medical treatment or diagnosis.”

RP 1370-81. The trial court ruled that it would be “appropriate to go into” what L said in her initial treatment with the psychologist, provided the state laid the proper foundation the statements were made for the purposes of medical treatment or diagnosis. RP 1375-76.⁶

At trial, Dr. Preston testified about being a licensed psychologist and how, in her first session with a patient, she takes information in order to be able to decide treatment goals. RP 1409-11. L was brought to see Preston by her mom in 2010. RP 1411. The therapist spoke first to Pack and Pack told her L’s allegations against her stepfather. RP 1410-12. She testified that, in forming a therapy treatment plan, information that abuse had occurred was important, but *not* the identity of the abuser. RP 1412-14. The doctor declared, “it’s not necessary to develop the treatment plan, but I mean, if - - over time it’s often helpful for the person.” RP 1414.

The psychologist then testified about 1) L’s fear that Fritz was going to break into the house and hurt her (RP 1411-13), 2) that L’s treatment goals included being “able to talk about the sexual abuse” (implying the crime had occurred) (RP 1413), 3) that L said Fritz “had ‘child molested’ her” (RP 1415), and 4) that L said Fritz had threatened she would lose her house and have to go to foster care because her family would not like her if she told about being abused (RP 1415).

⁶The court initially precluded the defense from eliciting that there were other “reasons for treatment,” stating the evidence would not be relevant. RP 1380-88. After the state elicited over defense objection that Dr. Preston had seen L off and on for years and that, over that time, L had “continue[d] to talk about dealing with issues with the Defendant and his abuse to her,” Dr. Preston ultimately admitted, however, that she only saw L three times in 2010 and when she saw the child later, in 2014, the appointments were mostly about her L’s troubles with family relationships. RP 1416.

b. The state failed to establish the foundation

The trial court abused its discretion in admitting the testimony of Dr. Preston relating was L said under the hearsay exception for statements made for the purposes of medical treatment or diagnosis. Under ER 803(a)(4), the following are considered excepted from the rule against hearsay:

Statements made for purposes of medical diagnosis or treatment and descriptive of medical history, or past or present symptoms, pain, or sensations, or the inception or general character of the cause or external source thereof insofar as reasonably pertinent to diagnosis or treatment.

The rule is premised on the idea that a person who is seeking medical treatment is likely to have a self-interest in providing reliable information for that purpose, so such declarations are trustworthy. See White v. Illinois, 502 U.S. 346, 355 n. 8, 112 S. Ct. 736, 116 L. Ed. 2d 848 (1992). The rule does not apply to statements which are not “reasonably pertinent to diagnosis or treatment,” however. See State v. Woods, 143 Wn.2d 561, 602, 23 P.3d 1046, cert. denied, 534 U.S. 964 (2001).

In general, statements attributing fault are not admissible under the rule, because they would not usually be relevant to diagnosis or treatment. See State v. Ashcraft, 71 Wn. App. 444, 457, 859 P.2d 60 (1993). Where the identity of the perpetrator is relevant to treatment and diagnosis, however, such as with claims of child abuse, statements of identity may be admissible, but other than that, only statements of causation. Id.

Here, Dr. Preston explicitly stated that identity of the alleged

abuser was *not* important to treatment. RP 1413-14. By definition, all of the L's statements attributing fault to Fritz thus were inadmissible under ER 803(a)(4). Further, there was no evidence that L had any idea that she needed to be truthful to Preson in order to receive relief. Statements are only for the purposes of medical diagnosis or treatment if the declarant's motive in making it was to promote diagnosis or treatment. See In re Pers. Restraint of Grasso, 151 Wn.2d 1, 20, 84 P.3d 859 (2004).

There is no question that a 9-year-old like L may be capable of understanding the concept of therapy and underlying treatment goals sufficiently for their statements to be admissible under ER 803(4). See State v. Carol M.D., 89 Wn. App. 77, 87, 948 P.2d 837 (1997), remanded on other grounds, 97 Wn. App. 355, 983 P.2d 1165 (1999). For example, where there is evidence the child understood that the therapist was there to help her, knew that having to be honest with the therapist to get better and that doing so would help make her "sadness" go away," such evidence would exist. See State ex rel. Juvenile Dept. of Multnomah Cnty v. Cornett, 121 Or. App. 265, 269-70, 855 P.2d 171 (1993). And while our courts appear to have allowed admission when a very young child such as a three-year-old is involved even without evidence the child understood the purpose of her statements in certain cases, here the child was nine. Carol M.D., 69 Wn. App. at 86-87 (nine year old is old enough to understand).

Notably, at trial, L did not remember talking to Preston about many things and knew only that she was a counselor, although L said

that she was truthful in what she said and seeing Preston helped “some.” RP 1106, 1109-10, 1119, 1132. L said she did not give Preston any details, though. RP 1138-39. The trial court abused its discretion in admitting the statements L made to Dr. Preston under the hearsay exception for statements made for purposes of medical diagnosis or treatment, without proper foundation.

c. The error was prejudicial

Error in admitting evidence will compel reversal where there is a reasonable probability that the error materially affected the outcome of the trial. See State v. Neal, 144 Wn.2d 600, 611, 30 P.3d 1255 (2001). If, for example, the evidence is likely to have had a minor impact in comparison with the weight of the other evidence, it will not meet that standard. Id. Here, the evidence improperly admitted was likely to have had more than just a minor impact. That evidence was the repetition of L’s claims through Dr. Preston, which bolstered the state’s case. The psychologist said that a treatment goal was getting so L could be “able to talk about the sexual abuse,” implying the crimes had occurred. RP 1413. Dr. Preston also repeated L’s declarations that Fritz had “child molested her” and that he threatened she would end up without a home if she told about being abused. RP 1415.

Further, the psychologist’s testimony reinforced the idea that L had a fear that Fritz was going to break into the house and abuse her. RP 1411-13.

It is important to remember that there was no physical evidence in this case. The only evidence was L’s word (her testimony at both

trials and her declarations repeated by others) and the admissions of guilt Pack said Fritz had made to her and to his family. But the admissions were at most admissions of touching, not penetration. Further, the jury already had serious questions about the case, as evidenced by its acquitting Fritz of three of the six counts.

In addition, there were already serious problems with the context in which the accusations were made and repeated. Statements of child witnesses present particular concerns regarding their reliability, because of issues of a child's susceptibility to suggestion through not just intentional but unintentional influence by the untrained. See Kennedy v. Louisiana, 554 U.S. 407, 443, 128 S. Ct. 2641, 171 L.Ed. 2d 525 (2008). Indeed, the Supreme Court has described a well-developed body of scientific research recognizing the "problem of unreliable, induced, and even imagined child testimony. See id.; see also, Arizona v. Youngblood 488 U.S. 51, 72 n. 8, 109 S. Ct. 333, 102 L. Ed. 2d (1988) (Blackmun, J., dissenting) (noting studies showing children are more likely to make mistaken identification than adults, especially with encouragement). Many courts have recognized the serious concerns regarding the reliability of child witnesses. See Fowler v. Sacramento County Sheriff's Dep't., 421 F.3d 1027, 1039 n. 7 (9th Cir. 2005); Washington v. Schriver, 255 F.3d 45, 57 (2d Cir. 2001) (noting an "emerging consensus in the case law" based on scientific studies showing that improper interviewing techniques are serious issues with child witnesses).

Children are more suggestible when questioned by an authority

figure (like grandma here), and are susceptible to “accommodating their reports of events to fit what they perceive the adult questioner to believe.” See Diana Younts, *Note: Evaluating and Admitting Expert Opinion Testimony in Child Sexual Abuse Prosecutions*, 41 DUKE L. J. 691, 692 (1991). They also can give incorrect answers when led to believe their initial answers were wrong (as with the agent here). See Sena Garven et al, *Allegations of Wrongdoing: The Effects of Reinforcement on Children’s Mundane and Fantastic Claims*, 85 J. APPLIED PSYCHOL. 38, 41-43 (2000). A number of actual convictions that have rested on child witness testimony have subsequently be reversed as untrue or unreliable, even in cases where the statements are subjected to cross-examination. See e.g., Elkins v. Summit County, Ohio, 615 F.3d 671 (6th Cir. 2010) (six-year-old identified her uncle as the person who assaulted and raped her; DNA later exonerates).

There is a debate as to the quantum of suggestion needed to either alter a child’s account or cause a child to falsely indicate abuse, but there is no dispute that, after the 1990’s, it is now clear that there are conditions under which a child is susceptible to false suggestion even about incredibly serious matters such as child abuse. See, Saywitz et al, *Children’s Memories of a Physical Examination Involving Genital Touch: Implications for Reports of Child Sexual Abuse*, 59 J. CONSULTING & CLINICAL PSYCHOL. 682, 687 (1991). In fact, where researchers gave a medical examination and then used leading questions to ask whether they had been sexually touched during that exam, 8% ended up falsely reporting such an improper touch as having

occurred. *Id.* Another study has indicated that, as compared to open-ended questions, children asked directed questions about serious non-abuse injuries made roughly five times as many errors in their responses. Peterson & Bell, *Children's Memory for Traumatic Injury*, 67 CHILD. DEV. 3045, 3059 (1996).

The risk is especially great when there is an authority figure such as a trusted adult asking the questions, both because of a child's belief that authority figures are omniscient and truthful and because of a child's desire to be accommodating to an adult. Younts, *Evaluating and Admitting Expert Opinion Testimony in Child Sexual Abuse Prosecutions*, 41 DUKE L. J. 691, 692 (1991). And suggestive questioning creates a significant risk of false accusations. *See* John R. Christiansen, *The Testimony of Child Witnesses: Fact, Fantasy, and the Influence of Pretrial Interviews*, 62 WASH. L. REV. 705, 707 (1987). Indeed, such questioning may so corrupt a child's memory that it will render the child's hearsay statements unreliable. *See In re A.E.P.*, 135 Wn2d 208, 230-31, 956 P.2d 297 (1998).

Admission of this statement was important to the state's case. The only issue was credibility, and the prosecutor used the repetition of the statements as evidence to prove L more credible. In closing argument, the prosecutor relied on how L had "described [her allegations] over and over again" and how she had "consistently explained" things over the years, including to Preston. RP 1611,-12, 1623-24, 1631-32, 1645, 1697, 1706, 1716-17. There is more than a reasonable probability the error affected the verdict. This Court

should so hold and should reverse.

4. THE COURT ABUSED ITS DISCRETION IN ALLOWING THE STATE TO REOPEN ITS CASE TO PRESENT TESTIMONY FROM THE FIRST TRIAL PROSECUTOR

The trial court also abused its discretion in allowing the state to reopen its case to present testimony from the first trial prosecutor.

a. Relevant facts

Anna Klein, a deputy prosecutor with Clark County Prosecutor's Office, conducted the child hearsay hearings before the first trial, on July 12, and August 2, 2010, and was the prosecutor throughout that first trial. RP 36-77, 88, 93-479. Before the second trial, after the trial court ruled that the state could play a recording of L's prior trial testimony to jurors, Klein testified to provide the foundation for what was described to jurors as a recorded "interview." RP 1048-49. The recording was then played for jurors (without picture) at trial. RP 1049-1065. Ms. Klein was asked to explain a representation she had made to L during the interview and she did so. RP 1065.

After she testified, she wanted to watch L testify but counsel demurred, noting he might need to call her as a witness to testify about some pretrial interviews first trial counsel had engaged in with her (but no defense investigator). RP 1068. Later, once the state had rested, Fritz presented his case and jury instructions were discussed. RP 1479-1527. The next day, however, the state moved to reopen, wanting to have Klein testify about what Pack had said in interviews Klein had done of Pack before the prior trial. RP 1530. Counsel objected on the grounds that, *inter alia*, it was improper to have

members of the same prosecutor's office testifying as witnesses and acting as counsel. RP 1562-63. The court overruled the objection, allowing Klein to testify about what the first-trial prosecutor said Pack had related - that Fritz had admitted to her that he had put his penis on L's privates. RP 1565-67. In closing argument, the prosecutor relied on Klein's testimony given after reopening in arguing guilt, relying on Klein's testimony that he admitted having "touched L[]'s privates with his penis," not the statements Pack herself made, that he admitted only touching. RP 1649-50, 1712.

b. The testimony on reopening was improper

The trial court erred in allowing the state to reopen its case to allow the deputy prosecutor to testify. In general, under RPC 3.7, the "advocate-witness" rule, a lawyer may not act as an advocate for a party and a witness at trial.⁷ State v. Lindsay, 180 Wn.2d 423-24, 326 P.3d 125 (2014) (quoting, United States v. Prantil, 764 F.2d 548, 552-53 (9th Cir. 1985)). The advocate-witness rule is "a necessary corollary to the more fundamental tenet of our adversarial system that juries are to ground their decisions on the facts of a case and not on the integrity or

⁷The rule provides:

A lawyer shall not act as an advocate in a trial in which the lawyer or another lawyer in the same firm is likely to be a necessary witness except where:

- (a) The testimony relates to an issue that is either uncontested or a formality;
- (b) The testimony relates to the nature and value of legal services rendered in the case; or
- (c) The lawyer has been called by the opposing party and the court rules that the lawyer may continue to act as an advocate; or
- (d) The trial judge finds that disqualification of the lawyer would work a substantial hardship on the client and that the likelihood of the lawyer being a necessary witness was not reasonably foreseeable before trial.

credibility of the advocates.” Prantil, 764 F.2d at 553. There is a risk a testifying prosecutor will not be fully objective as a witness given her role as an advocate for the government, but more than just that prosecutor’s ethics, the rule is “a matter of institutional concern implicating the basic foundations of our system of justice.” 764 F.2d at 553. By preventing prosecutors from testifying, the rule prevents the jury from attributing the prestige and prominence of the prosecutor’s office to that witness, thus ensuring a fair trial. See United States v. Johnston, 690 F.2d 638, 643-44 (7th Cir. 1982); see also, State v. Monday, 171 Wn.2d 667, 677, 257 P.3d 551 (2011) (the concept of a “[f]air trial’ certainly implies a trial in which” the prosecutor does not throw the prestige of his public office behind a witness against the accused).

A prosecutor’s office qualifies as a “law firm” under this rule. See State v. Bland, 90 Wn. App. 677, 679-80, 953 P.2d 126, review denied, 136 Wn.2d 1028 (1998). In Bland, the Court examined the roles of a prosecutor, however, and concluded that a prosecutor whose sole role in a case was as a social worker could properly testify to that effect, where the dual roles did not “artificially bolster the witness’s credibility or make it difficult for the jury to weigh the testimony,” and did not raise “an appearance of unfairness.” Bland, 90 Wn. App. at 680. For the Bland Court, the most important fact was that the witness had testified and been involved in the case solely in her capacity as a social worker. 90 Wn. App. at 681. She thus had no special personal interest stemming from her work with the

prosecutor's office, and any minor remaining concerns about her dual position affecting her objectivity could be handled with cross-examination. Id.

Here, the prosecutor's original testimony identifying the first-trial testimony as an "interview" and laying a foundation for it was not problematic. She did not serve as a real fact witness but more of a procedural one in explaining the tape, with the minor exception of demonstrating "open" and "closed." But her testimony on reopening was in error. At that point, she had been identified as a prosecutor, one who had been involved in the case. When she told jurors from the stand what she said she had heard Pack say in a prior interview, her status as a prosecutor stood squarely behind her. And her testimony went even further than Pack's by declaring that Pack had said not that he admitted touching but that he had admitted having "touched L[]'s privates with his penis." RP 1649, 1712.

The trial court abused its discretion and the "advocate-witness" prohibition was violated, with a wholly improper result. There is more than a reasonable probability that this error had a material effect on the case, given that it was the *only* evidence of an alleged confession to not "touching" but touching on L's privates, with his penis.

5. CUMULATIVE ERROR COMPELS REVERSAL

Even if the Court finds that each individual error standing alone does not compel reversal, reversal should be granted because the cumulative effect of the errors deprived Mr. Fritz of his due process rights to a fair trial. See State v. Greiff, 141 Wn.2d 910, 10 P.3d 390

(2000). In State v. Coe, 101 Wn.2d 772, 684 P.2d 668 (1984), for example, the Court reversed convictions for rape where the trial court improperly admitted evidence of Coe's sexual acts with his girlfriend, unproven allegations, and prior sexually oriented writings and the state violated discovery rules. While each error "might not be of sufficient gravity" alone, their combined effect mandated a new trial. Id.; see Venegas, 155 Wn. App. at 520. Where, as here, a case turns largely on witness credibility, this Court will reverse where "the accumulation of errors . . . is of sufficient magnitude[.]" Id.

This case meets that standard. The evidence at trial was thin. L's claims were contradictory even to the point of having been positive it happened at the apartment but then positive it had not. The jury was so unconvinced by L's claims that they did not just acquit, they explicitly found Fritz not guilty of half of the crimes alleged. Jurors were misled into believing that there was no other explanation for L's precocious sexual knowledge at age nine other than Fritz's guilt, not only by counsel's ineffectiveness but also by the prosecutor's misconduct in exploiting the absence of evidence she knew likely did exist. Jurors were also misled about their proper role by both counsel and the state, in ways which minimized the state's burden and shifted to Fritz the weight of giving a reason why L should not be believed. The therapists testimony reinforced the state's case even further. And then a prosecutor took the stand and related an alleged confession by Fritz which went even further than the testimony of Pack. All of these went to the crucial issue in the case: credibility. Even if the individual

errors do not support reversal, this Court should find their cumulative, corrosive effect deprived Fritz of a fundamentally fair trial in this close case. The Court should reverse.

E. CONCLUSION

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

DATED this 24th day of October, 2019.

Respectfully submitted,



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CERTIFICATE OF SERVICE BY MAIL/EFILING

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 Brief to opposing counsel via efilng this date and to appellante by depositing the same in the United States Mail, first class postage pre-paid, as follows, to Mr. Bruce Fritz, DOC 342644, Coyote Ridge CC, P.O. Box 769, Connell, WA. 99326.

DATED this 24th day of October, 2019.



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Appellate Court Case Title: State of Washington, Respondent v Bruce Lee Fritz, Appellant
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