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No. 50826-5-II

THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION TWO

STATE OF WASHINGTON,

Respondent,

v.

JOSE MORENO-HERNANDEZ,

Appellant.

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

OPENING BRIEF OF APPELLANT

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A. INTRODUCTION

R.Y.'s mother, Nelbis Moreno, left their native El Salvador to work in the United States when R.Y. was five-years-old. In the United States, Ms. Moreno married Jose Moreno-Hernandez. R.Y. was angry and hurt that her mother left her, and felt that her mother chose Mr. Moreno-Hernandez over her.

R.Y.'s mother sent for her to come to the United States at age 13, when R.Y. became pregnant by her adult, abusive boyfriend. R.Y. hated Mr. Moreno-Hernandez from the moment she arrived, and felt her mother did not love her. When 14-year-old R.Y.'s anger towards Mr. Moreno-Hernandez boiled over, she called the police, reporting that he had attempted to rape her.

R.Y.'s allegation of attempted rape differed depending on who she talked to. Her story was impermissibly bolstered throughout trial by the prosecutor's insistence on a mistranslation of Ms. Moreno's testimony. The court also erred in allowing irrelevant hearsay to further bolster R.Y.'s story. These errors, in addition to the vague, overly broad community custody condition, of "no contact" with minors requires reversal of Mr. Moreno-Hernandez's conviction and remand for a new trial and sentencing.

B. ASSIGNMENTS OF ERROR

1. The prosecutor committed misconduct by introducing his own testimony about the Spanish language interpretation used during in-court testimony to impermissibly bolster R.Y.'s otherwise uncorroborated testimony.

2. The prosecutor committed additional misconduct by bolstering and expressing personal opinion about the alleged victim's credibility throughout trial and during closing argument.

3. The trial court erred by admitting hearsay evidence that served no relevant purpose and was prejudicial.

4. The court imposed a vague, overly broad community custody provision.

C. ISSUES PERTAINING TO THE ASSIGNMENTS OF ERROR

1. A prosecutor may not be a witness in the proceedings, introduce evidence outside the record, or vouch for its own witness. Prosecutorial misconduct may deprive the accused the right to a fair trial is guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and article I, section 22 of the Washington State Constitution. U.S. Const. amend. VI; Const. art. I, sec. 22. Was the prosecutor's flouting of these rules misconduct that requires reversal of Mr. Moreno-Hernandez's conviction?

2. ER 801(c) prohibits the use of hearsay used to prove the truth of the matter asserted. Did the prosecutor's introduction of the statements that R.Y.'s mother and aunt made to her *after* she reported to police that Mr. Moreno-Hernandez attempted to rape her, and which had no bearing on her allegation of the criminal conduct, violate the rule against hearsay because they served no relevant purpose, and were used for the impermissible purpose of crediting R.Y.'s story?

3. The Fourteenth Amendment and article I, section 3 of the state constitution requires that citizens have fair warning of proscribed conduct. U.S. Const. XIV; Const. art. I, sec. 3. A statute is unconstitutionally vague if it (1) does not define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is proscribed, or (2) does not provide ascertainable standards of guilt to protect against arbitrary enforcement. Imposition of an unconstitutional community custody condition requires reversal. Does the court's order that Mr. Moreno-Hernandez have "no contact" with minors deprive him of fair warning because it is so vague and overbroad?

D. STATEMENT OF THE CASE

1. R.Y's separation from her mother and hatred for Mr. Moreno-Hernandez.

R.Y.'s mother, Nelbis Moreno, left her native El Salvador to work in the United States when R.Y. was five years old. RP 709-710; 1229.

R.Y. remained in El Salvador with her grandmother, Maria Antonia Arevalo-Rivera. RP 1230. Ms. Moreno sent money home to support R.Y. and the rest of her family. RP 710; 1230. R.Y. felt hurt, angry, and sad that her mother left her. RP 899.

In the United States, Ms. Moreno married Mr. Moreno-Hernandez. RP 1229-1230. R.Y. felt like her mother loved Mr. Moreno-Hernandez more than her. RP 903. When her mother came back to El Salvador to visit, R.Y. perceived that she spent all her time on the phone with Mr. Moreno-Hernandez. RP 714; 902. She continued to feel hurt, angry, and sad when her mother once again returned to the United States for work. RP 903.

R.Y.'s grandmother, who raised her in El Salvador, said that R.Y. did not like that her mother had a partner in the United States—she wanted her mother to herself. RP 1441-1442. R.Y. told her grandmother that she wanted to destroy her mother's marriage. RP 1441.

R.Y. did not obey her grandmother's rule against having boyfriends. RP 715; 905. When R.Y. was thirteen she ran away from her grandmother's house with her adult boyfriend. RP 917; 919. She became pregnant. RP 920. Her boyfriend got drunk and beat her. RP 919-920. When Ms. Moreno learned about the situation, she had R.Y.'s grandmother call the police in El Salvador, who looked for R.Y. RP 919. R.Y.'s boyfriend hid from police with R.Y. RP 919. After a few months of abuse from her boyfriend, R.Y. returned to her grandmother's home. RP 920. But R.Y.'s boyfriend would come to her grandmother's house looking for her. RP 921; 718.

R.Y. wanted to leave El Salvador to escape her boyfriend's abuse and make a better life for her unborn child. RP 923; 928. Ms. Moreno paid for her transport, taking out a loan to pay for it. RP 961, 1233. This was a month-long, difficult journey for pregnant 13-year-old R.Y. RP 925. R.Y. arrived in August and was immediately enrolled in school, which she attended until her daughter was born three months later. RP 734. She returned to school about two weeks after having her baby. RP 735. R.Y. and her baby had their own room in Mr. Moreno-Hernandez's and Ms. Moreno's two-bedroom apartment. RP 959.

R.Y. disliked Mr. Moreno-Hernandez from the moment she arrived in the United States. RP 930. They fought constantly. RP 945. R.Y.

admitted that anybody can make her angry, but she specifically got angry and annoyed when she was asked to help with chores around the house, like cleaning and doing the dishes. RP 905, 945-946, 1242. R.Y. fought constantly with Mr. Moreno-Hernandez about doing the chores, especially helping to take care of a neighbor child her mother and Mr. Moreno-Hernandez babysat for. RP 737, 945-946, 953. R.Y. got angry when Mr. Moreno-Hernandez asked her to help mop and sweep the floors her baby crawled on and to help with the dishes. RP 737-738, 964. R.Y. said Mr. Moreno-Hernandez accused her of watching too much television. RP 738, 959-961. R.Y. would go to her room and close the door because she would get tired of arguing about how much T.V. she watched. RP 960-961. She did not believe she should be forced to take part in household chores. RP 961.

Mr. Moreno-Hernandez babysat R.Y.'s baby while Ms. Moreno was at work and R.Y. was at school, along with a neighbor's child. RP 950. R.Y. did not think that this was real work. RP 950. And although R.Y. knew that Mr. Moreno-Hernandez had a back injury that prevented him from working outside the home, she still despised him for only being able to babysit. RP 895; 901.

Ms. Moreno worked two fast food jobs. RP 1238-1239. She paid for R.Y.'s cell phone and clothes, but R.Y. believed her mother only

bought things for herself or Mr. Moreno-Hernandez. RP 956, 1358. She accused her mother of being too “lazy” to pay for childcare for her baby while R.Y. was at school. RP 955. R.Y. also perceived that her mother worked so much that she had no time for her. RP 733.

Ms. Moreno consulted with an attorney to assist R.Y. in applying for immigration relief. RP 1243. Ms. Moreno wrote a letter describing how R.Y. had been physically and sexually abused by her adult boyfriend in El Salvador, which resulted in her pregnancy. RP 1290. Ms. Moreno’s letter in support of her daughter was based on what R.Y. told her—she had no firsthand knowledge of R.Y.’s relationship with the father of her baby. RP 1245, 1290. At trial, R.Y. said she had no idea what was in the immigration application and that her mother alone prepared it. RP 1051. R.Y. said she never imagined her mother would say that she was raped in El Salvador and that it was not true. RP 1042-1043, 1045, 1051. After arriving in the United States, R.Y. resumed contact with the father of her child and spoke with him by phone one to two times per week. RP 926-928.

The night before R.Y. called the police and alleged Mr. Moreno-Hernandez attempted to rape her, R.Y. claims she and Mr. Moreno-Hernandez had a huge fight about her mother’s request that she help give a bath to the neighbor boy they babysat. RP 975-976, 1247-1248. R.Y.

refused, claiming that her own child was sick. RP 975-976. R.Y. went into her room. RP 975. R.Y. stated that Mr. Moreno-Hernandez came into her room and demanded she bathe the child. RP 975. R.Y. claimed Mr. Moreno-Hernandez was so mad at her she thought he was going to hit her. 976. But R.Y. was not afraid of him. RP 976. Ms. Moreno remembered R.Y. telling Mr. Moreno-Hernandez that she would call the police if he bothered her anymore. RP 1248.

2. R.Y.'s differing accounts surrounding her allegation of attempted rape.

While Ms. Moreno was at work the next day, R.Y. called police, reporting that Mr. Moreno-Hernandez had attempted to forcibly rape her. RP 772. R.Y. was alone in the apartment with her baby when Officers Kevin Bartenetti and Khanh Phan arrived. RP 1168, 1221. Officer Bartenetti noted that R.Y. was visibly upset, but also “mostly subdued” and willing to talk. RP 1170. Officer Phan described that when they arrived, R.Y.’s emotional state was normal, and she was not crying or shaking. RP 1222. She had no physical marks on her and there was no sign of struggle in the apartment. RP 1182-1183.

Because of the language barrier, Officer Bartenetti called an interpreter to assist in taking a statement from R.Y. 1170-1171. By the

time the interpreter arrived, R.Y.'s uncle and cousin had also come to the apartment. RP 1172.

Police policy is to not take a detailed report from a suspected victim of a sex crime who is under 16 years old, and so Officer Bartenetti's report was limited. RP 1177-1178. In the brief interview he conducted with R.Y. through the interpreter that night, he learned that R.Y. claimed that Mr. Moreno-Hernandez pulled her into the bedroom while he was completely nude and attacked her. RP 1194; 1199-1200.

At trial, R.Y. testified that she was laying in her bed when Mr. Moreno-Hernandez entered her bedroom fully clothed. RP 979. She said he grabbed her by her left arm, pulled her off her bed, and threw her onto the floor. RP 995-998. She said he unbuttoned and pulled down his pants and threw himself on top of her. RP 999. She claimed that he tried to spread her legs open with his legs and pulled down her pants, but not her underpants. RP 757. She said he grabbed his penis and tried to "put it in mine." RP 759-761. She said she defended herself by kicking and yelling at him. RP 760. When she told him she would call the police, she said he got up and hurried out of the room. RP 770-771.

At trial, R.Y. said that Mr. Moreno-Hernandez said nothing to her when she said she was calling the police. RP 771. The night police took her statement, she told them that Mr. Moreno-Hernandez told her that he

would assault her if she called police, and that he was going to rape her no matter what. RP 1200.

R.Y.'s uncle transported her to the care of Child Protective Services (CPS) that night. RP 1119, 1122. R.Y. told the CPS investigator who interviewed her that she had told her mother about allegations against Mr. Moreno-Hernandez in the past, which made CPS decide that R.Y. could not be returned to her mother. RP 1398. However, at trial, R.Y. said she never told her mother that Mr. Moreno-Hernandez previously tried to touch her. RP 742-743.

At trial, R.Y. testified that Mr. Moreno-Hernandez tried to touch her hands and legs on a few occasions before her allegation of attempted rape. RP 742. And in a previous recorded interview, R.Y. claimed that Mr. Moreno-Hernandez physically touched her legs and breasts when she first arrived in the United States. RP 1032-1034; CP 151. The prosecutor presented this highly prejudicial, anticipated testimony in opening: "As [R.Y.] sat on the couch watching TV and [Mr. Moreno-Hernandez] was there, he would take the opportunities to grope her legs and rub her breasts." RP 603. But at trial, R.Y. specifically denied that Mr. Moreno-Hernandez had touched her breasts. RP 1023.

The evening police responded to her call, R.Y. said that Mr. Moreno-Hernandez had tried to do this in the past. RP 1086. R.Y. was

interviewed numerous times after being removed from the home, including in video recorded interviews. RP 886, 1028. In one such interview R.Y. claimed that about a month after she arrived in the United States, and while she was still pregnant, Mr. Moreno jumped on her while she was sitting on the couch and tried kissing her. RP 1030. At trial, she said this did not happen, and did not remember if she made that claim previously or not. RP 1029; 1030-1031-32.

At trial, R.Y. testified to a new detail that she had not previously told the prosecutor, nor mentioned in multiple defense interviews or recorded interviews with detectives. RP 779, 796, 886. She claimed that when her uncle drove her to the police station that night, Mr. Moreno-Hernandez called her uncle's phone. RP 834. She said her uncle's phone was on speaker and she could hear what was being said. RP 834. She said Mr. Moreno-Hernandez told her uncle "he had gotten himself in a big problem by helping me. And he—and he told him that he was going to get some money from him." RP 834. R.Y. claimed that after that call, her uncle left her at the building with police officers and never came back for her. RP 835. Her uncle, who testified at trial, said Mr. Moreno-Hernandez never called him about the case. RP 1089.

At trial, Ms. Moreno testified that the night R.Y. called police, her sister called her at work and told her that that Mr. Moreno-Hernandez was

pestering or annoying R.Y. RP 1269. This description was mistranslated to the jury as “molesting.” RP 1261. The interpreter later told the jury about the mistake, but the prosecutor continued to extensively question Ms. Moreno about the translation from the previous day, based on his own recollection of how the interpreter translated his questions to her. RP 1270-1273. The prosecutor even insisted on the mistranslation in closing argument, making it seem as though Ms. Moreno was told about R.Y.’s claim to police yet did nothing, which was not true. RP 1261; 1268-1273. 1510.

None of R.Y.’s family, including her mother, aunt, and uncle supported her allegations against Mr. Moreno-Hernandez. RP 1503. R.Y.’s mother thought R.Y. made them up and urged her daughter to tell the truth. RP 841. R.Y. testified in detail about the out-of-court statements she claimed her mother and aunt made to her, asserting they threatened her and urged her withdraw her allegations, even though these statements had no bearing on her report of the alleged assault. RP 840-841, 882-83.

Based on R.Y.’s allegation, Mr. Moreno-Hernandez was convicted of attempted rape in the second degree.¹ CP 157; 123. He had an offender

¹ Mr. Moreno-Hernandez was also convicted of child molestation in the third degree based on the same conduct, which the trial court correctly merged with the conviction for attempted rape. CP 146-147; 148.

score of zero. CP 158. He was sentenced to serve 60 months to life imprisonment, and community custody for life. CP 161-162.

E. ARGUMENT

1. Mr. Moreno-Hernandez’s trial was plagued by the prosecutor’s misconduct, which included testifying about the Spanish language interpretation to a witness absent evidence he was qualified to do so, and bolstering R.Y.’s testimony, which was severely undermined by previous inconsistent statements.

- a. Prosecutorial misconduct deprives the accused of due process.

The right to a fair trial is a fundamental liberty secured by the Sixth and Fourteenth Amendments to the United States Constitution and article I, section 22 of the Washington State Constitution. U.S. Const. amend. VI, XIV. “Every prosecutor is a quasi-judicial officer of the court, charged with the duty of insuring that an accused receives a fair trial.” *State v. Boehning*, 127 Wn. App. 511, 518, 111 P.3d 899 (2005). Accordingly, “[p]rosecutorial misconduct may deprive a defendant of his constitutional right to a fair trial.” *In re Glasmann*, 175 Wn.2d 696, 703–04, 286 P.3d 673 (2012).

Like review of evidentiary errors, allegations of prosecutorial misconduct are reviewed under an abuse of discretion standard. *State v. Lindsay*, 180 Wn.2d 423, 430, 326 P.3d 125 (2014); *Salas v. Hi-Tech Erectors*, 168 Wn.2d 664, 668, 230 P.3d 583 (2010).

- b. The prosecutor extensively questioned Ms. Moreno about the Spanish translation after the interpreter corrected the prejudicial mistranslation of her testimony.

During direct-examination of Ms. Moreno, the prosecutor questioned her extensively about her actions the evening that R.Y. called the police, asking her about the contents of a phone call she had received that night from her sister, Patricia Guzman, R.Y.'s aunt. Her answer was translated to the jury as follows:

Q. But did Patricia call you by phone?

A. Yes, by phone.

Q. And what did she indicate [R.Y.] had said?

A. My husband has been molesting her.

RP 1251. The prosecutor emphasized the sexual connotation of word "molest" when asking her, again, on direct, over defense objection, the following:

Q. So you got a call at 7:00 p.m. that indicated your daughter said that the defendant had molested her; you didn't ask your manager for a ride home at that moment?

RP 1253. And again:

Q. So you're telling me that you told your manager, 'My daughter just told me she's being molested,' and he said, 'I won't give you a ride home'?

RP 1253.

After the jury was excused, the interpreter informed the court that the word, "molest" in Ms. Moreno's testimony was mistranslated. RP

1260. The interpreter advised the court that Spanish word, “*molestar*” was mistranslated into English, incorrectly using the sexual word, “molesting.”

The word should have been translated into English as “bothering or mistreating” R.Y. RP 1260. The interpreter informed the court:

[T]he problem is that it does -- a false cognate because ‘molestar’ in Spanish and ‘molest’ in English, they have totally different meaning.

RP 1261 (emphasis added). The jury was informed about the mistranslation the next day. RP 1268.

Immediately after this correction, the prosecutor continued to assert the mistranslation of “*molestar*” to incorrectly assert a sexual connotation, asking Ms. Moreno:

Q. And at some point during that conversation with your sister, you understood that the accusation that your daughter was making was that your husband had sexually molested her that evening, correct?

A. No. I didn’t think that because she had never told me that he had annoyed her in that manner.

RP 1270. The prosecutor then testified about his recollection of the Spanish language interpretation as if it were evidence:

Q. Yesterday when I asked this question, you told us -- you told the interpreter that you were -- your sister called and told you that your husband -- that [R.Y] had said that Jose was bothering or annoying her, correct?

A. Yes. Just annoying, bothering, pestering. That’s it.

Q. And you used the verb “*molestar*.”

MR. CUMMINGS: For the record that's M-O-L-E-S-T-A-R.

Q. Correct?

A. Yes. That's so.

Q. When we asked that question, we had this same set up, correct?

A. Yes.

Q. So there was one interpreter interpreting my questions and another interpreter interpreting your answers, correct?

A. Yes.

Q. Okay. And so the interpreter at the time who was interpreting your answers, you used the word "*molestar*," correct?

A. Yes. That's so.

Q. But then I asked the question, "You were aware" -- or something to the effect that you knew that your daughter was saying that Jose had molested your daughter, correct?

A. I was not conscious of this because she had not said anything to me, as I will repeat again.

Q. So -- but isn't it correct that the interpreter who was interpreting questions for me did not use the word '*molestar*'? She used '*abuso deshonesto*'--

MR. CUMMINGS: Which for the record is A-B-U-S-O, '*abuso*,' and '*deshonesto*' is D-E-S-H-O-N-E-S-T-O.

RP 1270-1271. The defense vigorously objected to this line of questioning without testimony from the interpreter. RP 1271-1272. The defense pointed out that if there were a record of this, it would be in Spanish. RP 1272. The court allowed the prosecutor to continue to ask questions about the translation of his questions, asking her about the Spanish translations from the previous day as if they were evidence:

Q. When I asked the followup question, I used the word -- the word that was translated to you was *abuso deshonesto*, correct?

A. My sister never said at any moment that he was being sexually inappropriate or that he had been naked or anything like that.

Q. That's not the question I just asked you; is it, Ms. Moreno-Hernandez? Is it?

A. But it's the same thing. It's the same thing when you're talking about sexual inappropriateness. And if that's not how I should understand it, explain it to me.

Q. So I'm going to repeat my question. My question is, when I asked the follow up question yesterday, the verb that was translated from my question was not *molestar*. It was *abuso deshonesto*, correct?

A. Well, I don't remember that you had -- if you asked me that question.

Q. Okay. So you don't recall what you testified to yesterday afternoon?

MR. WICKENS: Your Honor, that's not what she said. She said --

THE WITNESS: Of course I --

MR. WICKENS: -- and I object --

THE COURT: Overruled. Overruled.

RP 1272-1273.

The prosecutor used his recollection of the Spanish language interpretation to impeach Ms. Moreno, even though her testimony was that she did not know about a sexual abuse allegation that night:

You didn't get off the phone from your -- talking to your sister, call 911, and say, 'Can you please send a police officer to my home? I think my daughter may need some assistance.'

A. Well, I didn't think at that moment.

Q. Not about Roxana anyway.

MR. WICKENS: Objection, Your Honor. That's argumentative.

THE COURT: Overruled.

RP 1277.

The prosecutor then *again* returned to questioning Ms. Moreno about his recollection of the Spanish language that was translated to her the previous day in to infer that Ms. Moreno was informed that her daughter was sexually abused that night:

My question is, when you say that Ruben used the word *molestar*, is it your understanding Ruben observed the report that Roxana made to the police?

A. Yes. That's so.

Q. If we're talking about someone taking down the pants of a 14-year-old girl and forcibly rubbing their penis between their leg, would you call that *molestar*, M-O-L-E-S-T-A-R?

A. I didn't know anything about that.

Q. That's not my question; is it? My question is, that situation I described, where someone forcibly removes the pants of a 14-year-old girl and rubs their penis between her legs, would you use the word *molestar*, M-O-L-E-S-T-A-R, to describe that action?

A. No. It's different.

Q. Right. That's *abuso deshonesto* -- A-B-U-S-O D-E-S-H-O-N-E-S-T-O -- isn't it?

RP 1286-87. The court overruled the defense's continued objection to the prosecutor testifying about the Spanish language. RP 1287-88; 1304-1305.

The court ruled the prosecutor was doing nothing more than establishing the meaning of a word that was used. RP 1311.

After this extensive questioning about the meaning of the Spanish translated words, the prosecutor again inserted the incorrect translation of *molestar* in closing argument, even though it had clearly been corrected by the interpreter:

Meanwhile, across town, Nelbis Moreno-Hernandez had learned that something -- her daughter had alleged that the defendant had molested her, and she did nothing.

RP 1510.

- c. The prosecutor committed misconduct when he introduced evidence outside the record, improperly acted as a witness, and inappropriately repeated R.Y.'s allegation to bolster her story.

i. The prosecutor violated the witness advocate rule when he questioned Ms. Moreno purposely using a paraphrased version of R.Y.'s testimony based on his memory and knowledge of the Spanish language rather than the official court record.

The prosecutor is not a witness and should not be permitted to add to the record “either by subtle or gross improprieties.” *Donnelly v.*

DeChristoforo, 416 U.S. 637, 650–51, 94 S. Ct. 1868, 1875, 40 L. Ed. 2d

431 (1974). The advocate witness rule prohibits an attorney from

appearing as both a witness and an advocate in the same litigation.

Lindsay, 180 Wn.2d at 437 (quoting *United States v. Prantil*, 764 F.2d

548, 552–53 (9th Cir.1985)).

“This venerable 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 credibility of the advocates.” *Prantil*, 764 F.2d at 553. This rule concerns “more than just an ethical obligation of individual counsel,” it is, in fact, “a matter of institutional concern implicating the basic foundations of our system of justice.” *Id.* Barring testimony from the participating prosecutor, the advocate witness rule “eliminates the risk that a testifying prosecutor will not be a fully objective witness given his [or her] position as an advocate for the government.” *Id.* (quoting *United States v. Johnston*, 690 F.2d 638, 643 (7th Cir.1982)). Further, the rule prevents the prestige and prominence of the prosecutor’s office from being attributed to testimony by a testifying prosecutor. *Id.*

The prosecutor acted as witness when he paraphrased the testimony of R.Y to Ms. Moreno—twice describing in detail the act of “someone forcibly remov[ing] the pants of a 14-year-old girl and rubs their penis between her legs” and then told Ms. Moreno the meaning of this conduct in Spanish: “that’s abuso deshonesto—A-B-U-S-O D-E-S-H-O-N-E-S-T-O—isn’t it?” RP 1287.

He also impermissibly testified about how his questions were translated to Ms. Moreno the previous day. RP 1271 (“[I]sn’t it correct

that the interpreter who was interpreting questions for me did not use the word ‘molestar’? She used ‘abuso deshonesto.’”)

Furthermore, a witness may not testify to the content of the translation unless there is evidence that he or she understood the words spoken. *See State v. Morales*, 173 Wn.2d 560, 573–74, 269 P.3d 263 (2012) (The trial court limited the trooper’s testimony to “[w]hat he did and what he said. But he can’t speak on behalf of, of course, the defendant or the interpreter.”). Here, as argued by Mr. Moreno-Hernandez, there was no evidence that the prosecutor even spoke Spanish, or was pronouncing the words correctly when interrogating his witness about them. RP 1305.

The prosecutor’s repeated paraphrasing of R.Y.’s allegation and how Spanish words were translated was doubly improper, because he not only repeated R.Y.’s testimony through phrasing her allegation as a statement Ms. Moreno was required to adopt, but also put forth testimony about the meaning of the Spanish language, without any evidence that the prosecutor in fact had knowledge of which he spoke. This was an improper melding of the prosecutor as witness and advocate. *See Lindsay*, 180 Wn.2d at 437.

ii. The prosecutor's questioning introduced evidence that was not part of the record, which was misconduct.

It is misconduct for a prosecutor to submit extrinsic evidence to a jury. *State v. Vassar*, 188 Wn. App. 251, 259, 352 P.3d 856 (2015); *State v. Jones*, 144 Wn. App. 284, 298, 183 P.3d 307 (2008) (Prosecutors have an ethical duty to ensure a fair trial by presenting only competent evidence). Extrinsic evidence is defined as “information that is outside all the evidence admitted at trial.” *Vassar*, 188 Wn. App. at 259.

Prosecutors are not permitted to make prejudicial statements unsupported by the record. *Jones*, 144 Wn. App. at 293; *see also State v. Dhaliwal*, 150 Wn.2d 559, 577, 79 P.3d 432 (2003) (statements not sustained by the record are improper); *Glasmann*, 175 Wn.2d at 705 (citing *State v. Pete*, 152 Wn.2d 546, 553–55, 98 P.3d 803 (2004)) (It is error to submit evidence to the jury that has not been admitted at trial).

RCW 2.32.050(2) requires the clerk “to record the proceedings of the court.” This record was not obtained when the prosecutor questioned Ms. Moreno about the translation of his questions into Spanish the previous day. The prosecutor instead relied on his memory and personal knowledge of the spelling and meaning of the Spanish language words, “molestar” and “abuso deshonesto.” RP 1271; 1273. Evidence of these

translations were not admitted evidence.² These translations as introduced by the prosecutor were therefore extrinsic evidence, or “information that is outside all the evidence admitted at trial.” *Vassar*, 188 Wn. App. at 259.

iii. The prosecutor usurped the interpreter’s role as the expert.

The prosecutor usurped the role of the expert interpreter by his questioning of Ms. Moreno about the Spanish language translation.

An interpreter who interprets a testifying witnesses’ testimony must be qualified as an expert. ER 604.³ *See also United States v. Taren-Palma*, 997 F.2d 525, 531 (9th Cir. 1993) (citing FRE 604) (overruled on other grounds by *United States v. Shabani*, 513 U.S. 10, 11, 115 S.Ct. 382, 130 L.Ed.2d 225 (1994)).⁴ And an interpreter may testify as an expert if specialized knowledge will assist the trier of fact in understanding the evidence. *See Taren-Palma*, 997 F.2d at 531; ER 702.

² Admission of evidence is defined as “The allowance before a fact-finder of testimony, documents, or other materials for consideration in determining the facts at issue in a trial or hearing.” Black’s Law Dictionary (10th ed. 2014), ADMISSION OF EVIDENCE.

³ ER 604 reads in full: “An interpreter is subject to the provisions of these rules relating to qualification as an expert and the administration of an oath or affirmation to make a true translation.”

⁴ FRE 604 has the same requirements as ER 604: “An interpreter must be qualified and must give an oath or affirmation to make a true translation.”

“Cross-examination that attempts to impeach by slipping in unrelayed on opinions and conclusions without calling the experts to testify is improper.” *State v. Hamilton*, 196 Wn. App. 461, 464, 383 P.3d 1062 (2016), *review denied*, 187 Wn.2d 1026, 391 P.3d 454 (2017) (citing Robert H. Aronson & Maureen A. Howard, *The Law of Evidence in Washington* § 8.03(8)(b), at 8–67 (5th ed. 2016)).

Without being qualified as an expert in the Spanish language, the prosecutor cross-examined Ms. Moreno about how his questions were translated to her in Spanish the previous day. He relied on his own memory and unverified language skills to question her about whether a word was translated to her as “abuso deshonesto” and not “molestar.” RP 1271-1273.⁵ He then had her affirm that the sexual misconduct he paraphrased from R.Y.’s testimony would be translated as “abuso deshonesto.” RP 1287.

The prosecutor’s questioning of Ms. Moreno also inappropriately belittled her use and knowledge of the Spanish language, and may have improperly appealed to the juror’s racial or ethnic bias by emphasizing her ethnicity through a focus on the language she speaks. See *State v. Monday*,

⁵ Though this was direct examination, the prosecutor often treated Ms. Morales as a hostile witness, without declaring her as such, as noted by the trial court. RP 1316.

171 Wn.2d 667, 678, 257 P.3d 551 (2011) (“Not all appeals to racial prejudice are blatant. Perhaps more effective but just as insidious are subtle references. Like wolves in sheep’s clothing, a careful word here and there can trigger racial bias.”)

The prosecutor’s reliance on his own memory and translation of the words that had been translated to Ms. Moreno the previous day, rather than referring to a transcript or calling the interpreter as an expert witness on the translations, was an improper form of impeachment. *Hamilton*, 196 Wn. App. at 464.

The prosecutor’s questioning of Ms. Moreno was misconduct, violating various principles designed to ensure the right to of the accused to a fair trial, including the prohibition against the prosecutor acting as an advocate and witness at trial, introducing extrinsic evidence, and usurping the expert’s role in cross-examination.

- d. The prosecutor committed additional misconduct by bolstering and expressing personal opinion about R.Y.’s credibility throughout trial and during closing argument.

There was no evidence of an attempted rape other than R.Y.’s statement that it happened, which led the prosecutor to impermissibly bolster R.Y.’s ever-changing claims.

Improper vouching occurs when the prosecutor indicates that evidence not presented at trial supports the testimony of a witness. *State v. Thorgerson*, 172 Wn.2d 438, 443, 258 P.3d 43 (2011) (citing *State v. Ish*, 170 Wn.2d 189, 196, 241 P.3d 389 (2010)). In *Thorgerson*, the Court found that it may improperly bolster a witness’s credibility for the prosecution to make references to the victim having made additional out-of-court statements consistent with her in-court testimony. *Thorgerson*, 172 Wn.2d at 447. In *Thorgerson*, the Court determined there was not a substantial likelihood that the outcome of the proceeding was altered by this bolstering because the defense had elicited the testimony, and there were already many other witnesses who testified about the victim’s consistent statement, so “the references to additional consistent statements did not provide any additional ground for finding the defendant guilty.” *Id.* at 448; 450.

By contrast, here, there was no corroboration of R.Y.’s testimony, other than the prosecution’s repetition of it. The prosecutor tried to credit R.Y.’s story by deliberately eliciting inadmissible hearsay evidence from R.Y.’s foster mother, Yanilda Dafe, asking:

Q. Did Roxana ever give you details about what happened to her on October 1, 2015?

A. Yes, she did.

Q. And what did she say happened?

A. She said –

MR. WICKENS: Your Honor, I will object as hearsay, Your Honor.

THE COURT: Sustained.

MR. CUMMINGS: Just to make my record, Your Honor, it's a consistent statement regarding -- and goes directly to her credibility. She has been consistent to every person she's spoken to, and this merely explains and exemplifies that.

RP 1145 (emphasis added).

Though the court admonished the prosecutor off the record for this inappropriate speaking objection, the jury nevertheless heard the prosecutor's opinion that R.Y. had been consistent throughout, including in evidence that was not presented at trial. RP 1147-1148. This far exceeded the prosecutor's closing argument misconduct in *Thorgerson*, because the prosecutor's commentary about Ms. Dafe's inadmissible statement was made during the presentation of evidence, and thus would necessarily be confused as evidence—making it far more harmful than a misstatement in closing, which is argument. *See Thorgerson*, 172 Wn.2d at 448. And most importantly, unlike in *Thorgerson*, there were no other witnesses to corroborate R.Y.'s claim, which made the prosecutor's reference to inadmissible evidence far more likely to affect the jury verdict.

To buffer R.Y.'s inconsistencies, the prosecutor made impermissible comments over defense objection that he did not believe the inconsistencies in R.Y.'s testimony were important by asking, "you probably did not tell them exactly the same words that you used here today; is that right?" RP 774.

A prosecutor's comment which expresses a personal opinion of witness veracity is improper. *State v. Stith*, 71 Wn. App. 14, 19, 856 P.2d 415 (1993). Whether a witness testifies truthfully is for the jury to decide. *Ish*, 170 Wn.2d at 196.

In closing, the prosecutor impermissibly told the jury that R.Y. was being honest about her allegation:

She explained to you very honestly about how that occurred, that she didn't expect it, and her focus at that moment was defending herself.

RP 1508.

Whether R.Y. "honestly" described events was a question for the jury alone, and should not have been an opinion offered by the prosecutor.

- e. This pervasive misconduct prejudiced Mr. Moreno-Hernandez and requires reversal and remand for a new trial.

A prosecutor's improper conduct that prejudices the accused requires reversal. *Lindsay*, 180 Wn.2d at 444. Prejudice is established if

there is a substantial likelihood that the prosecutor's statements affected the jury's verdict. *Id.* at 440 (citing *State v. Emery*, 174 Wn.2d 741, 760, 278 P.3d 653 (2012)). Where there is no objection at trial, reversal is required if the misconduct was so flagrant and ill intentioned that an instruction would not have cured the prejudice.⁶ *Glassman*, 175 Wn.2d at 704. And cumulative error may warrant reversal for prosecutorial misconduct, even if each error standing alone would otherwise be considered harmless. *State v. Weber*, 159 Wn.2d 252, 279, 149 P.3d 646 (2006).

Here, where the prosecutor's improper vouching and bolstering of R.Y.'s credibility permeated Mr. Moreno-Hernandez's entire trial and R.Y.'s credibility was the central issue at trial, there is a substantial likelihood the cumulative effect of the errors affected the verdict, which deprived Mr. Moreno-Hernandez of his right to a fair trial. *Jones*, 144 Wn. App. at 301.

Consideration of any material by a jury not properly admitted as evidence vitiates a verdict when there is a reasonable ground to believe

⁶ Mr. Moreno-Hernandez asserts that his objection to the various instances of misconduct at the time are sufficient for review under the standard for preserved error; however, because it was so intentional, flagrant, and permeated the proceedings, the misconduct also meets the heightened standard for unpreserved error.

that the defendant may have been prejudiced. *Glasmann*, 175 Wn.2d at 705. In questioning Ms. Moreno, the prosecutor's impermissible assertion of the meaning of Spanish words served to corroborate R.Y.'s allegation through sheer repetition and insinuation that Ms. Moreno was told about a sexual assault that night, when in fact the interpreter clarified those were not Ms. Moreno's words. RP 1268. This certainly prejudiced Mr. Moreno-Hernandez because his conviction rested on R.Y.'s testimony alone.

It becomes more prejudicial when the prosecutor insisted on using the improper interpretation in closing to discredit Ms. Moreno, and credit R.Y.⁷ RP 1510. The prosecutor's insistence on the sexual connotation of the English word "molested" when that was not part of the record was a flagrant disregard of the correction made by the interpreter and constitutes clear and intentional misconduct. RP 1268.

The prosecutor's misstatements regarding what Ms. Moreno was told that night would have had great weight with the jury because the prosecutor held himself out as knowledgeable about the Spanish language through extended examination of Ms. Moreno about the meaning and

⁷ Though the prosecutor's misstatement at closing was not objected to, Mr. Moreno-Hernandez strenuously objected to the prosecutor's misconduct of questioning of Ms. Moreno about the translation of this word, which was overruled by the trial court. RP 1271-1273; 1277; 1288; 1311.

spelling of Spanish language words. This tactic impermissibly insinuated a corroboration of R.Y.'s claim of sexual assault that did not exist, and was invalid impeachment of Ms. Moreno, who did not believe R.Y.'s allegations.

The prejudice of this misconduct was compounded by the prosecutor's personal vouching for the consistency and honesty of R.Y.'s allegations. The prosecutor's personal vouching encouraged the jury to overlook the myriad inconsistencies of R.Y.'s statements surrounding the allegation through improper conduct. The cumulative effect of this misconduct prejudiced Mr. Moreno-Hernandez and requires a new trial.

Jones, 144 Wn. App. at 301.

2. The trial court erred in admitting hearsay that served no relevant purpose, other than to impermissibly credit R.Y.'s testimony.

- a. The court admitted irrelevant hearsay about what R.Y.'s aunt and mother told her after she made her allegations against Mr. Moreno-Hernandez.

Mr. Moreno-Hernandez moved to prohibit R.Y. from testifying about her mother's and aunt's hearsay statements in which they expressed nonsupport for her allegations against Mr. Moreno-Hernandez. RP 840-841. The court overruled Mr. Moreno-Hernandez's motion based on the prosecution's claimed use, which was "effect on the listener." RP 840,

852. R.Y.'s state of mind after the allegation was not a controverted issue. These statements were irrelevant and therefore inadmissible.

Hearsay is an out-of-court statement offered “to prove the truth of the matter asserted.” ER 801(c). A statement is not hearsay if it shows the effect on the listener, without regard to the truth of the statement. *State v. Edwards*, 131 Wn. App. 611, 614, 128 P.3d 631 (2006).

Out-of-court declarations must be relevant to an issue in controversy. *Edwards*, 131 Wn. App. at 614. Whether or not a statement was hearsay is reviewed de novo. *State v. Hudlow*, 182 Wn. App. 266, 281, 331 P.3d 90 (2014).

In *Edwards*, the court admitted the statements of an informant on the State's theory that these statements caused the detective to begin his investigation. *Edwards*, 131 Wn. App. at 614. The *Edwards* court deemed this inadmissible hearsay since the detective's motive for starting his investigation “was not an issue in controversy” and therefore not relevant. *Id.* at 614.

In *Hudlow*, the substance of an informant's conversation with the defendant overheard by police were inadmissible to show the effect on the listener, because the detective's understanding—the purported state of mind basis for admission— was irrelevant to any issue in the prosecution. *Hudlow*, 182 Wn. App. at 277-278.

The hearsay statements of R.Y.'s mother and aunt are similarly inadmissible because they are not relevant to an issue in controversy, which is whether the alleged crime in fact occurred. When the prosecutor first asked whether R.Y. remembered anyone discussing her baby at the CPS meeting after she called the police and was removed from her home, R.Y. said "no." RP 840. But then, when asked again, what her mother told her if she did not take back her report, R.Y. responded:

A. Well, she told me several times to tell the truth. And she would also tell me that I was a minor and that she was going to keep my child. And she would -- told me quite a few times. She would tell me to behave myself, to mind her or she would take my child away.

Q. Okay.

RP 841.

The court overruled Mr. Moreno-Hernandez's hearsay objection, allowing in these statements as "effect on the listener." RP 840. Likewise, R.Y. was permitted to testify about text messages she received from her Aunt Patricia, as argued by the prosecutor, on the grounds that they go to "her credibility and the effect on the listener." RP 852. R.Y. testified that she received text messages from her aunt in which her aunt asked her to "lie" so she could go back with her mother, or say "what I alleged happened had not happened." RP 883.

But R.Y.'s state of mind after reporting her allegations was not at issue. There was no recantation, only changing testimony about the details as she talked to more interviewers. Like in *Edwards*, where the detective's state of mind was simply not relevant to whether the defendant committed the charged crimes, here R.Y.'s state of mind after the allegation was entirely irrelevant to the charged crime. *Edwards*, 131 Wn. App. at 615. Ms. Moreno and R.Y.'s aunt's statements expressing a lack of support for R.Y.'s allegations against Mr. Moreno-Hernandez served no relevant purpose, because as emphasized by the prosecution, R.Y. never recanted her allegations. RP 1511. Thus there was no controverted issue as to the effect on R.Y.'s allegation against Mr. Moreno-Hernandez.

The only issue was the credibility of R.Y.'s statement, the details of which changed over time. But these inconsistent reports about what R.Y. claims happened have nothing to do with the pressure R.Y. claims her mother and aunt put on her to tell the truth after she alleged the crime.

Rather, as stated by the prosecutor as an alternative basis for admission, the hearsay statements served to bolster her credibility, which is not a valid hearsay exception. RP 852; ER 801, 802, 803. Because these out-of-court statements had no relevant purpose, and were used to prove the truth of the matter asserted, that R.Y.'s claim of attempted rape occurred, they were hearsay, and should not have been admitted. *Edwards*,

131 Wn. App. at 615 (citing *State v. Roberts*, 80 Wn. App. 342, 352-53, 908 P.2d 892 (1996)).

- b. Admission of these hearsay statements was prejudicial because they were used to credit R.Y.'s otherwise inconsistent reports.

The error in admitting irrelevant hearsay was highly prejudicial, because it was used to bolster R.Y.'s story, which was the only evidence against Mr. Moreno-Hernandez and was riddled with inconsistencies.

Evidentiary error is grounds for reversal if it results in prejudice. *State v. Neal*, 144 Wn.2d 600, 611, 30 P.3d 1255 (2012) (citing *State v. Bourgeois*, 133 Wn.2d 389, 403, 945 P.2d 1120 (1997)). An error is prejudicial if, “within reasonable probabilities, had the error not occurred, the outcome of the trial would have been materially affected.” *Id.* (citing *State v. Smith*, 106 Wn.2d 772, 780, 725 P.2d 951 (1986)).

In closing argument the prosecutor emphasized these hearsay statements as evidence of R.Y.'s reliability and perseverance in the truth:

Despite the odds stacked against her, despite the fact that her mother chose her abuser over her, that her family went from supportive to turning their backs on her, the moment she reached out for help, [R.Y.] persisted.

RP 1503. And again:

And after all of that, interview after interview, time after time, three days of testimony, she's been consistent about what happened to her. She's been given every chance to take it back, and she won't, every reason to take it back, and she won't. Every test of her credibility that someone

could put on her, she's gone through. And she's been consistent and explained and asked in the midst of it, 'Please listen to me. Please listen.'

RP 1513.

But despite the prosecutor's insistence to the contrary, there were many inconsistencies in how R.Y reported the alleged rape occurred—in one instance reporting that Mr. Moreno-Hernandez dragged her into the bedroom naked, but then at trial testifying he came into her bedroom fully clothed. RP 1199; 979. And R.Y. denied her earlier claims that Mr. Moreno-Hernandez had previously assaulted her and touched her, all of which raised serious questions about the credibility of R.Y's allegations.

These inconsistencies were especially glaring because of R.Y.'s explicit hatred for Mr. Moreno-Hernandez prior to her allegations. This inadmissible hearsay materially affected the outcome at trial because by directly telling the jury R.Y. had "passed every test of credibility," premised on inadmissible hearsay, the jury was urged to overlook these highly problematic inconsistencies in R.Y.'s account.

3. The community custody of "no contact" with minors provision is vague and overbroad.

In addition to potentially serving a life sentence for this offense, Mr. Moreno-Hernandez faces lifetime community custody. CP 161-162. One lifetime condition includes "no contact" with minors. CP 160. This vague, overbroad condition should be stricken.

a. The community custody condition is ripe for review.

Community custody conditions are ripe for review on direct appeal “if the issues raised are primarily legal, do not require further factual development, and the challenged action is final.” *State v. Irwin*, 191 Wn. App. 644, 650, 364 P.3d 830 (2015) (citing *State v. Bahl*, 164 Wn.2d 739, 751, 193 P.3d 678 (2008)). *State v. Valencia* set out a four-pronged test for determining ripeness, allowing review where analysis for vagueness is a (1) legal question that (2) requires no additional factual development (3) the court’s order is final, and (4) there would be significant hardship were the court not to rule. 169 Wn.2d 782, 786-91, 239 P.3d 1059 (2010). All apply to Mr. Moreno-Hernandez’s purely legal challenge of the court’s final order.

b. The condition requiring no contact with minors is vague and overbroad.

The due process vagueness doctrine under the Fourteenth Amendment and article I, section 3 of the state constitution requires that citizens have fair warning of proscribed conduct. *City of Spokane v. Douglass*, 115 Wn.2d 171, 178, 795 P.2d 693 (1990). A statute is unconstitutionally vague if it “(1) ... does not define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is proscribed, or (2) ... does not provide ascertainable standards of guilt to protect against arbitrary enforcement.” *Bahl*, 164 Wn.2d at 752–

53. Community custody conditions will be reversed if manifestly unreasonable. *Valencia*, 169 Wn.2d at 791-92. Imposition of an unconstitutional condition is manifestly unreasonable. *Bahl*, 164 Wn.2d at 753.

Irwin addressed the constitutional vagueness of a much more specific community custody condition than Mr. Moreno-Hernandez's general "no contact" with minors provision. In *Irwin*, the defendant was ordered to not "frequent areas where minor children are known to congregate, as defined by the supervising [community corrections officer (CCO)]." 191 Wn. App. at 649. The condition did not include examples of prohibited locations. *Irwin* held that the condition failed the first prong of the vagueness analysis because, "[w]ithout some clarifying language or an illustrative list of prohibited locations ... the condition does not give ordinary people sufficient notice to 'understand what conduct is proscribed.'" Id. at 655 (quoting *Bahl*, 164 Wn.2d at 753).

The all-inclusive "no contact" with minors imposed on Mr. Moreno-Hernandez is even more lacking in guidance. "Contact" as used here is so general that it provides no standard—it could presumably include letter, phone, or potentially even mere proximity or eye contact with a minor. The overly broad provision of "no contact," with no other specification on what type of conduct is prohibited, would potentially

preclude even contact with minor family members by phone or sight, which is an impermissibly vague condition.

This order fails to provide Mr. Moreno-Hernandez with the required notice of what conduct is prohibited and must be stricken. *Irwin*, 191 Wn. App. at 655.

F. CONCLUSION

Mr. Moreno-Hernandez was convicted after a trial tainted by prosecutorial misconduct that resulted in R.Y.'s allegation being repeated and credited by the prosecutor through improper questioning of his own witnesses, and improper argument to the jury. This error was compounded by the court's admission of hearsay that served no relevant purpose other than to allow the prosecutor additional means of crediting R.Y.

Remand for a new trial is required, as is remand for resentencing in order for the vague community custody provision of "no contact" to be stricken.

DATED this 19th day of March 2018.

Respectfully submitted,

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

STATE OF WASHINGTON,)	
)	
Respondent,)	
)	
v.)	NO. 50826-5-II
)	
JOSE MORENO-HERNANDEZ,)	
)	
Appellant.)	

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