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NO. 50892-3-II

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

STATE OF WASHINGTON,

Respondent,

v.

ANDRE VARGAS,

Appellant.

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

The Honorable Shelly Speir, Judge

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. Appellant was denied his constitutional right to a fair trial by a jury when the complaining witness's mother gave her opinion that she believed her daughter's allegations.

2. The prosecutor committed misconduct in purposefully eliciting improper opinion testimony from the complaining witness's mother that she believed her daughter's allegations.

3. The trial court erred in admitting hearsay evidence from several witnesses that, years after the alleged incidents, the complaining witness disclosed the allegations to them and identified her father as the perpetrator.

4. The trial court erred in admitting hearsay evidence that the complaining witness sent an incriminating text message to appellant, but he did not adopt the admission or respond in any way.

5. Cumulative error deprived appellant of a fair trial.

6. The trial court erred in prohibiting appellant's access to or use of the internet or e-mail as a condition of community custody where it is not crime-related (condition 23).

7. The trial court erred in prohibiting appellant's use of a computer or computer-related device as a condition of community custody where it is not crime-related (condition 24).

8. The trial court erred in ordering appellant to stay out of areas where children's activities regularly occur or are occurring as a condition of community custody where it is not crime-related (condition 18).

9. The trial court erred in barring appellant's use of alcohol as a condition of community custody where it is not crime-related (condition 11).

Issues Pertaining to Assignments of Error

1. The complaining witness's mother testified she believed her daughter's allegations of sexual abuse against her father.

a. Was this testimony manifest constitutional error, necessitating reversal where it was an obvious, impermissible opinion on the credibility of the complaining witness?

b. Was eliciting this improper opinion testimony also prosecutorial misconduct, necessitating reversal because no curative instruction could have erased the harm done by a mother's opinion that her daughter was telling the truth and her husband was therefore guilty?

2. Did the trial court err in allowing multiple witnesses to testify the complaining witness disclosed the allegations to them and identified her father as the perpetrator years after the alleged incidents, where the testimony was inadmissible and prejudicial hearsay?

3. Did the trial court err in admitting a text message sent by the complaining witness to appellant, accusing him of the crimes, where

appellant did not respond to in any way and would not be expected to respond under the circumstances, as required for an admission by a party opponent?

4. Did cumulative error deprive appellant of a fair trial, where is impermissibly bolstered the complaining witness's allegations?

5. Should this Court strike several conditions of community custody and remand to the trial court for resentencing, where those conditions bear no relationship to the convicted offenses and are therefore not crime-related, as required by statute?

B. STATEMENT OF THE CASE

On June 26, 2017, the State charged Andre Vargas with four counts of third degree child rape. CP 3-5. On July 12, 2017, the State amended the information to narrow the charging period. CP 6-8; RP 2-3. The State alleged that, between June 1, 2012 and December 31, 2012, Vargas had sexual intercourse with M.V., his daughter who was then 14 years old, on four occasions, contrary to RCW 9A.44.079. CP 6-8. The State alleged these were domestic violence incidents, as defined by RCW 10.99.020. CP 6-8. Vargas proceeded to a jury trial in July of 2017.

M.V. lived in Graham, Washington, with her father, Vargas, her mother, K.V., her older brother, and her twin brother. RP 63-64. M.V. explained she was very close with her father because her mother worked

long hours. RP 68. M.V. typically used the bathroom in her parents' bedroom and explained it was not unusual for her family to shower in front of each other. RP 69-71, 200.

M.V. testified, in June of 2012, around the end of eighth grade when she was 14, she began to take an interest in boys. RP 76-77. M.V. texted a photograph of herself in her underwear to a boy at school. RP 76-77. Her parents found out and were upset. RP 76-77.

M.V. explained this incident essentially spurred the alleged sexual abuse. RP 79-80. She testified it began when her father asked her if she knew what a "blow job" was. RP 79-80. Soon, M.V. explained, her father showed her his penis after getting out of the shower because she had never seen one before. RP 80-81. M.V. testified the next time he showed her his penis "it turned into him showing me how to do a hand job." RP 81. M.V. said this type of contact occurred approximately five to ten times that summer, always in her parents' bedroom or bathroom while her mother was away at work. RP 84-87. M.V. recalled her father explaining to her that he was teaching her about boys and sex. RP 85.

M.V. also testified she had begun menstruating around that time and it hurt for her to wear tampons. RP 85-87. M.V. claimed her father said it would help if she stretched her vagina. RP 87. M.V. testified this led to him digitally penetrating her and then penetrating her vagina with his penis, but it

hurt so they stopped. RP 87-89. The State relied on this first alleged incident of vaginal penetration for Count 1. RP 438-39, 444-45.

M.V. testified to another incident where she claimed her father ejaculated inside her during vaginal intercourse. RP 90-92. M.V. recalled being “super freaked out” about getting pregnant, but her father told her it would be fine because he was “fixed.” RP 90-91. The State relied on this allegation for Count 2. RP 438-39, 445. M.V. testified Vargas penetrated her vagina with his penis “at least like ten times” that summer. RP 103.

Another time, M.V. explained, her father penetrated her with his fingers and then put his mouth on her vagina. RP 102-03. The State relied on this instance of oral intercourse for Count 3. RP 438-39, 446. M.V. testified this type of contact occurred only once or twice. RP 100-02.

M.V. also testified her father brought home a pornography DVD and a dildo that summer, which he showed her but did not use. RP 94-96. Another time, M.V. claimed, Vargas showed her a video on his phone of a woman performing fellatio on a horse. RP 96-97. M.V. also said her father showed her how to put a condom on him. RP 94, 97-98.

M.V. testified she finally reached a breaking point and told her father she was either going to kill herself or run away if the sexual contact continued. RP 103-06. M.V. and her father agreed the activity would stop if she performed oral sex on him, which she had not previously done. RP 106-

08. M.V. testified this occurred in her parents' bedroom and lasted approximately three seconds, sometime in September of 2012, after the start of her ninth grade year. RP 107-08. The State relied on this allegation for Count 4. RP 438-39, 446. No further sexual activity occurred. RP 107-08.

M.V. did not disclose the allegations to anyone for several years. M.V. explained she did not want to ruin her family or put her brothers through that. RP 147. The first person M.V. told was her friend Mercedes Montgomery, though their testimony differed as to when M.V. disclosed. RP 141-44, 336. M.V. made Montgomery promise not to tell anyone, though Montgomery ultimately convinced M.V. to tell her mother. RP 338-40, 344.

M.V. saved some text messages from her father, exchanged well after the alleged incidents. Ex. 1. In August of 2015, M.V. told her father, "you didn't screw up my life you've done the world for me but I'm afraid to ever have a [boyfriend] because of what you've done." Ex. 1. She continued, "There's not a day that goes by that I don't think about that." Ex. 1. Vargas responded, "Me to[o] [and] I thought I was your [boyfriend]." Ex. 1; RP 132-33. M.V. later took a screenshot of this exchange and sent it to Montgomery, who sent it back after M.V. got a new phone. RP 146.

M.V. told her mother about the allegations in December of 2015, with Montgomery present. RP 148-50, 219-22. K.V. testified she believed

what her daughter told her. RP 228. M.V. explained her mother was “extremely supportive,” but did not want to tell the police right away. RP 149-50, 224-25. M.V. explained they did not want to distract her twin from graduating and her grandmother had just been diagnosed with cancer. RP 150. M.V. did not tell anyone else for another five months. RP 244.

In May of 2016, M.V. told her high school education advisor, Ryan McIntosh, about the alleged abuse. RP 155, 293-95, 304-06. McIntosh reported the allegations to Child Protective Services (CPS). RP 304-10. Detective Jessica Whitehead then interviewed M.V. at school, with McIntosh present, on June 8, 2016. RP 156-58, 369-71. Whitehead did not ask M.V. if she wanted to undergo a sexual assault examination. RP 384.

Whitehead contacted Vargas on June 24, 2016, after M.V.’s and her twin’s graduation party. RP 159, 374-76. Vargas’s cell phone was seized and searched. RP 378-79. Nothing of evidentiary value was found on Vargas’s cell phone. RP 380-81. When the rest of the Vargas family moved out of their home shortly thereafter, they did not find any pornography, sex toys, or condoms that M.V. claimed her father showed her. RP 171-72, 181-82, 199, 238.

The jury found Vargas guilty as charged on all four counts. CP 45-52. The jury also returned special verdict forms finding Vargas and M.V. to be members of the same family or household. CP 45-52.

Vargas has no prior felony history, but had an offender score of nine with the four current offenses. CP 72-73, 77. The standard range sentence was 60 to 60 months, so the trial court had no discretion to impose any sentence but 60 months of confinement. CP 77-80, RP 505-08. The court imposed community custody subject to any earned release time and specified several conditions of community custody. CP 81, 85, 91-92, RP 508.

Vargas filed a timely notice of appeal. CP 66.

C. ARGUMENT

1. IMPROPER OPINION TESTIMONY FROM M.V.'S MOTHER THAT SHE BELIEVED HER DAUGHTER'S ACCUSATIONS DEPRIVED VARGAS OF A FAIR TRIAL.

On direct examination of M.V.'s mother, K.V., the State asked about M.V.'s disclosure of the allegations to her. RP 228. The State ultimately asked, "Did you believe your daughter?" RP 228. K.V. answered, "Yes." RP 228. M.V., Montgomery, and Detective Whitehead all testified K.V. was supportive of her daughter. RP 150, 345, 375. Defense counsel did not object to any of this testimony.

This questioning, particularly the pointed question of K.V. as to whether she believed her daughter, was an impermissible comment on M.V.'s credibility and the veracity of her allegations. Introduction of such an obvious comment on M.V.'s credibility is manifest constitutional error

under well-established Washington law. Purposefully eliciting improper opinion testimony likewise constitutes prosecutorial misconduct. Given that the entire case hinged on M.V.'s credibility, the error was not harmless under any standard applied. A new trial is necessary.

- a. Washington law holds it is both manifest constitutional error and prosecutorial misconduct to elicit a witness's opinion regarding the credibility of another witness.

The role of the jury is "inviolable" under the Washington Constitution. CONST. art I, §§ 21, 22. The right to have factual questions decided by the jury is crucial to the jury trial right. U.S. CONST. amend. VI; CONST. art. I, §§ 21, 22; Sofie v. Fibreboard Corp., 112 Wn.2d 636, 656, 771 P.2d 711 (1989). "To the jury is consigned under the constitution 'the ultimate power to weigh the evidence and determine the facts.'" State v. Montgomery, 163 Wn.2d 577, 590, 183 P.3d 267 (2008) (quoting James v. Robeck, 79 Wn.2d 864, 869, 490 P.2d 878 (1971)). It is exclusively "the function of the jury to assess the credibility of a witness and the reasonableness of the witness's responses." State v. Demery, 144 Wn.2d 753, 762, 30 P.3d 1278 (2001) (plurality opinion).

As such, no witness "may testify to his opinion as to the guilt of a defendant, whether by direct statement or inference." State v. Black, 109 Wn.2d 336, 348, 754 P.2d 12 (1987). Nor may a witness "give an opinion

on another witness'[s] credibility" or the "veracity of the defendant." State v. Carlson, 80 Wn. App. 116, 123, 906 P.2d 999 (1995). Opinion testimony is therefore "clearly inappropriate" in a criminal trial when it contains "expressions of personal belief[s] to the guilt of the defendant, the intent of the accused, or the veracity of witnesses." Montgomery, 163 Wn.2d at 591.

In State v. Jones, Jones was convicted of unlawfully possessing a firearm. 117 Wn. App. 89, 90, 68 P.3d 1153 (2003). A police officer saw Jones making furtive movements and discovered the gun under the passenger seat of the car where Jones was sitting. Id. During an interview, the officer insisted Jones must have known about the gun. Id. at 91. At trial, the officer explained he "addressed the issue that, you know, I just didn't believe him. There was no way that someone was sitting in that car, and everything that had transpired from my eyes." Id. (quoting report of proceedings). On appeal, Jones argued the prosecutor committed flagrant and ill-intentioned misconduct by eliciting this testimony. Id. at 90-91.

The Jones court found "no meaningful difference between allowing an officer to testify directly that he does not believe the defendant and allowing the officer to testify that he told the defendant during questioning that he did not believe him." Id. at 92. Either way, "the jury learns the police officer's opinion about the defendant's credibility." Id. The court held the officer's testimony that he believed Jones was lying during the

interrogation constituted inadmissible opinion evidence. Id. The error was prejudicial and required reversal. Id.

Two decisions by this Court are particularly instructive here: State v. Johnson, 152 Wn. App. 924, 219 P.3d 958 (2009), and State v. Jerrels, 83 Wn. App. 503, 925 P.2d 209 (1996). In Johnson, this Court reversed Johnson's conviction for child molestation because of improper opinion testimony. 152 Wn. App. at 934. Rather than opinions of police officers, Johnson involved out-of-court statements by Johnson's wife indicating she believed the complainant's allegations. Id. at 931. The complainant (T.W.), her mother, and her stepfather all related an incident where Johnson's wife confronted T.W. about the accusations and demanded T.W. prove they were true. Id. at 931-32. When T.W. recounted details of Johnson's intimate anatomy and sexual habits, Johnson's wife burst into tears, acknowledged it must be true, and hours later attempted suicide. Id. at 932-33.

The Johnson court held it was manifest constitutional error to admit Johnson's wife's opinion and reversed despite the lack of objection below. Id. at 934. Improper opinion testimony rises to the level of manifest constitutional error, reviewable for the first time on appeal under RAP 2.5(a)(3), when there is an "an explicit or almost explicit witness statement on an ultimate issue of fact." State v. Kirkman, 159 Wn.2d 918, 936, 155

P.3d 125 (2007). In Johnson, the error was constitutional because it implicated Johnson's right to a fair trial. 152 Wn. App. at 934.

The error was also manifest because it actually affected Johnson's right to a fair trial. Id. This Court explained the testimony shed "little or no light on any witness's credibility or on evidence properly before the jury and really only tells us what [Johnson's wife] believed." Id. at 933. The court emphasized "the jury should not have heard collateral testimony that Johnson's wife believed T.W.'s allegations." Id. at 934. The testimony "served no purpose except to prejudice the jury," thereby denying Johnson a fair trial. Id.

Jerrels considered a similar issue through the lens of prosecutorial misconduct. Prosecutors are officers of the court and have a duty to ensure that an accused person receives a fair trial. Berger v. United States, 295 U.S. 78, 88, 55 S. Ct. 629, 79 L. Ed. 1314 (1935); State v. Monday, 171 Wn.2d 667, 676, 257 P.3d 551 (2011). When there is a substantial likelihood that improper comments affected the jury's verdict, the accused's rights to a fair trial and to be tried by an impartial jury are violated. U.S. CONST. amend. XIV; CONST. art. 1, §§ 3, 22; State v. Reed, 102 Wn.2d 140, 145, 684 P.2d 699 (1984).

A prosecutor commits misconduct by asking clearly objectionable questions that seek to elicit inadmissible testimony from a witness. Jerrels,

83 Wn. App. at 507-08. “Such questioning invades the jury’s province and is unfair and misleading.” Id. at 507. Similarly, “[a] prosecutor has no right to call to the attention of the jury matters or considerations which the jurors have no right to consider.” State v. Belgarde, 110 Wn.2d 504, 508, 755 P.2d 174 (1988).

Jerrels was accused of raping and molesting his daughter and two stepchildren. Jerrels, 83 Wn. App. at 504. During trial, the prosecutor asked Jerrels’s wife, the mother of the three children, if she believed the children were telling the truth about Jerrels’s actions. Id. at 506-07. Jerrels’s wife answered that she believed the children. Id. at 506.

This Court held the prosecutor’s questions were “clearly improper because the prosecutor inquired whether she believed the children were telling the truth; thus, misconduct occurred.” Id. at 508. The court pointed to another similar case where it reversed when a pediatrician testified that, based on the child’s statements, she believed the child had been abused. Id. (citing State v. Carlson, 80 Wn. App. 116, 122, 129, 906 P.2d 999 (1995)). The Jerrels court emphasized a prosecutor commits misconduct when he or she “seeks to compel a witness’[s] opinion as to whether another witness is telling the truth.” Id. at 507. “Such misconduct violates a defendant’s due process right to a fair trial.” Id. at 508.

Johnson and Jerrels, both decisions by this Court, control. K.V.'s testimony regarding her daughter's credibility was just as explicit as the testimony in Jerrels:

Q. Did you believe your daughter?

A. Yes.

RP 228. K.V.'s opinion that her daughter was telling the truth was "clearly inappropriate" and served no purpose except to prejudice Vargas. Montgomery, 163 Wn.2d at 591.

Under Johnson, K.V.'s testimony that she believed her daughter was manifest constitutional error, despite defense counsel's failure to object. It was an explicit opinion on the credibility of the complaining witness, M.V. See Montgomery, 163 Wn.2d at 596 n.9 ("We note that if there were evidence that these improper opinions influenced the jury's verdict, we would not hesitate to find actual prejudice and manifest constitutional error regardless of the failure to object or the likelihood that an objection would have been sustained.").

Under Jerrels, the State likewise committed misconduct by purposefully eliciting K.V.'s inadmissible opinion that she believed her daughter. The clear import of both the question and the answer was that M.V. was telling the truth, which meant Vargas must be guilty. The same was true of M.V.'s, Montgomery's, and Detective Whitehead's testimony

that K.V. was supportive of her daughter. RP 150, 345, 375. This, too, suggested K.V. believed her daughter's allegations. It was misconduct for the prosecutor to ask these questions in light of clear authority holding that a witness may not comment on the credibility of another witness. Jerrels, 83 Wn. App. at 507-08.

The State may argue that the questions were appropriate given M.V.'s credibility and delayed disclosure were at issue. But the credibility of a complaining witness in a rape case will nearly always be at issue. Indeed, the Jerrels court recognized the complaining witness's credibility played a "crucial role" at trial and found the error prejudicial on that basis. 83 Wn. App. at 508. The Johnson court likewise explained such testimony "sheds little or no light on any witness's credibility or on evidence properly before the jury and really tells us only what [the witness] believed." 152 Wn. App. at 933. These cases demonstrate a challenge to the complaining witness's credibility does not transform improper opinion testimony into proper testimony.

- b. A mother's opinion that she believed her daughter's accusations could not easily be disregarded, prejudicing the outcome of Vargas's trial.

Both manifest constitutional error and prosecutorial misconduct are subject to harmless error analysis, though different standards apply. Constitutional error is presumed prejudicial, and the State bears the burden

of establishing the error was harmless beyond a reasonable doubt. State v. Olmedo, 112 Wn. App. 525, 533, 49 P.3d 960 (2002). Constitutional error is harmless only when the untainted evidence is so overwhelming that it necessarily leads to a finding of guilt. Id.

Reversal is required, even without defense objection, when a prosecutor's misconduct is so flagrant and ill-intentioned that no curative instruction could have erased the prejudice. State v. Fisher, 165 Wn.2d 727, 747, 202 P.3d 937 (2009). "In other words, if the misconduct cannot be remedied and is material to the outcome of the trial, the defendant has been denied his due process right to a fair trial." State v. Suarez-Bravo, 72 Wn. App. 359, 367, 864 P.2d 426 (1994).

Reversal is necessary under either of these harmless error standards. Jerrels is again instructive. There, defense counsel did not object to the prosecutor's questions of the mother about whether she believed her children. Jerrels, 83 Wn. App. at 506-08. The court concluded this misconduct was flagrant and ill-intentioned. Id. at 508. "A mother's opinion as to her children's veracity could not easily be disregarded even if the jury had been instructed to do so." Id.

Notably, in Jerrels, there was some medical evidence corroborating one of the children's allegations of sexual abuse. Id. at 508. The three children also corroborated each other's stories. Id. However, "there were no

other witnesses to the abuse.” Id. And, “[b]ecause credibility played such a crucial role, the prosecutor’s improper questions were material and highly prejudicial.” Id. This Court therefore held Jerrels was denied a fair trial and reversed. Id.; see also Jones, 117 Wn. App. at 92 (reversing because “an instruction would not have cured the harm” from the officer’s testimony that he did not believe Jones).

In Johnson, too, the improper opinion testimony was “highly prejudicial” because it showed “Johnson’s own wife believed the accusations.” 152 Wn. App. at 933-34. Reversal was required. Id. at 937.

Jerrels and Johnson demonstrate reversal is necessary here. Like Jerrels, there were no witnesses to the alleged incidents. M.V. explained the incidents occurred in her parents’ bedroom or bathroom, with the door locked. RP 84-85. Her mother was always away at work and her brothers in another room. RP 85. M.V.’s brothers did not testify. K.V. testified she never suspected anything. RP 208.

The only “overlapping” incident M.V. and K.V. testified to differed significantly in its retelling. M.V. said one time, at night, the family was all downstairs in the living room together because they had lost power. RP 92-93. M.V. claimed her father digitally penetrated her underneath a blanket. RP 92-93. M.V. recalled her mother asking what was going on. RP 93. K.V., however, recalled that she came home from work in the afternoon and

the power was out. RP 208-09. She found M.V. and Vargas lying close together in bed upstairs and asked them what they were doing. RP 208-09. In closing, the State had to acknowledge the “discrepancies” in this purported incident. RP 451-52.

Unlike Jerrels, however, there was not even any corroborating evidence. No sexual assault examination was performed. RP 384. The pornography, dildo, and condoms were never found. RP 171-72, 181-82, 199, 238. Nothing of evidentiary value was discovered on Vargas’s seized cell phone, despite there being 194 text messages between M.V. and Vargas since March of 2016. RP 380-81, 475. M.V. delayed disclosing to anyone but her best friend and her mother for over three years. RP 155-58. In other words, there was even less evidence to support M.V.’s testimony than in Jerrels. Reversal was still necessary there, as it is here.

M.V. saved text messages from her father, including one where he said, “I thought I was your boyfriend,” but at no point did Vargas admit to any abuse. RP 131, Ex. 1. M.V. obviously thought the texts were significant, but they were not “smoking gun” evidence that established her testimony was true. Again, the State was forced to acknowledge in closing “the text messages don’t scream -- they don’t have the defendant on the hook saying, yes, daughter, I indeed raped you.” RP 442.

The case came down to M.V.'s credibility. The State acknowledged as much before trial: "We have a he said versus she said situation." RP 16. The ultimate questions for the jury were: Is M.V. telling the truth? Is she credible? Are her accusations to be believed? K.V. answered these ultimate issues of fact for the jury. She testified she believed her daughter. RP 228. Like in Jerrels, the jury could not easily ignore a mother's opinion that her daughter's accusations were true. Like in Johnson, the testimony was highly prejudicial because Vargas's own wife and M.V.'s own mother believed the accusations. Where credibility plays a "crucial role" in the outcome of the trial, such improper opinion testimony necessitates reversal. Jerrels, 83 Wn. App. at 509.

The Washington Supreme Court recognized long ago that, where improperly admitted evidence is of such a prejudicial nature, no curative instruction can fix the resulting damage:

[W]here evidence is admitted which is inherently prejudicial and of such a nature as to be most likely to impress itself upon the minds of the jurors, a subsequent withdrawal of that evidence, even when accompanied by an instruction to disregard, cannot logically be said to remove the prejudicial impression created . . . We are not assured that the evidentiary harpoon here inserted could effectively be withdrawn. It was equipped with too many barbs.

State v. Suleski, 67 Wn.2d 45, 51, 406 P.2d 613 (1965).

Irreparable damage was done when the State asked M.V.'s own mother whether she believed M.V.'s accusations. Defense counsel understandably did not want to draw further attention to State's question or K.V.'s answer by objecting. No instruction could have removed the prejudiced created by K.V.'s answer that she believed her daughter and the obvious implication that she believed Vargas was guilty. And, certainly, the State cannot demonstrate the error was harmless beyond a reasonable doubt where the entire case hinged on M.V.'s credibility.

The evidence that K.V. believed her daughter—whether manifest constitutional error or flagrant and ill-intentioned misconduct—deprived Vargas of a fair trial. This Court should reverse Vargas's convictions and remand for a new trial. Jerrels, 83 Wn. App. at 508.

2. IMPROPER HEARSAY TESTIMONY FROM MULTIPLE WITNESSES THAT M.V. DISCLOSED THE ALLEGATIONS TO THEM PREJUDICED THE OUTCOME OF VARGAS'S TRIAL.

Several witnesses testified that, years after the alleged abuse, M.V. disclosed the allegations to them and identified her father as the perpetrator. This testimony was improper hearsay and should not have been admitted. The fact of M.V.'s disclosures and identification of her father, repeated by numerous witnesses, impermissibly bolstered M.V.'s credibility, in a case

without any corroborating evidence. There is a reasonable probability these multiple errors affected the outcome of Vargas's trial. Reversal is required.

- a. Multiple witnesses testified M.V. disclosed the allegations to them and identified her father as the perpetrator, years after the alleged incidents occurred.

Before trial, the State moved to admit M.V.'s disclosure of the allegations and identification of her father to Montgomery, her mother, her education advisor, McIntosh, and then to Detective Whitehead. CP 96-97; RP 25-26. The State argued that, "[w]hile the substantive details of M.V.'s disclosures are hearsay, her prior identification of the defendant as her perpetrator is not," citing ER 801(d)(1) and State v. Grover, 55 Wn. App. 252, 777 P.2d 22 (1989). CP 96-97.

Defense counsel objected, pointing out Grover was factually distinguishable: "they were saying, you know, I was drunk. I don't remember. So then a police officer was able to come in and testify, you know, this is what the person told me at the time that they identified these people." RP 25. Counsel emphasized M.V. would be testifying, "yes, my father did this," so it was unnecessary for other witnesses to say M.V. identified Vargas. RP 25.

The trial court admitted the disclosures "for identification purposes only." RP 26. The court cautioned the State, "[y]ou're going to have to word your questions very delicately." RP 26. The court reiterated the State

must warn its witnesses in advance “that they can’t be giving any details.” RP 26. In a subsequent written ruling, the trial court specified it “granted the State’s motion over the defense’s objection to admit M.V.’s statements identifying the defendant as the perpetrator for identification purposes only.” CP 13. The party who loses a motion in limine has a standing objection and does not need to make further objections. State v. Kelly, 102 Wn.2d 188, 193, 685 P.2d 564 (1984).

M.V. testified she first disclosed the allegations to her friend, Montgomery. RP 141-44. M.V. explained she then disclosed to her mother in December of 2015, and “told her everything.” RP 148-49. Finally, M.V. testified she told her school counselor, McIntosh. RP 155.

Montgomery testified on direct examination that M.V. “share[d] something with [her] that we’re addressing here in court,” and it involved Vargas. RP 336. Montgomery said this disclosure occurred around November of 2015, during their senior year. RP 336. Montgomery explained she and M.V. were talking, and “then [M.V.] proceeded to tell me that she had something to tell me.” RP 336. Montgomery testified she “could tell it was pretty much like eating [M.V.] up inside.” RP 336. Montgomery explained M.V. made her promise not to tell anyone. RP 337.

M.V.’s mother, K.V., testified M.V. made a disclosure to her “about something that had happened to her” and Vargas was the person who “had

done something to her.” RP 219. K.V. explained this occurred in December of 2015, at the Starbucks in Graham, with Montgomery present. RP 219-20. K.V. reiterated M.V. “told [her] something about the defendant.” RP 220. She said M.V. was “shaking and crying” when she did so. RP 221. K.V. likewise testified that M.V. disclosed to a counselor in May, who contacted the police. RP 229. K.V. did not confront Vargas or report M.V.’s disclosure to the police. RP 225-27, 244.

The high school education advisor, McIntosh, likewise testified M.V. disclosed the allegations to him. McIntosh explained he and M.V. were talking about her family life in mid-May of 2016 when she told him, paraphrasing, “Mr. Mac, had you really known, X, Y, and Z, your perspective might be different and you might think differently.” RP 304-05. McIntosh said he reminded M.V. he was a mandatory reporter. RP 305-06. He testified M.V. then told him something happened with “[h]er father” and the disclosure “alarmed” him.” RP 304-05. McIntosh explained he then spoke with the school’s guidance counselor, who instructed him to report it to CPS, which he did. RP 305.

Detective Whitehead testified she interviewed M.V. at her high school, with McIntosh present, after receiving the CPS report. RP 370-71. She explained M.V. made a disclosure to her and identified her father as the “perpetrator.” RP 371.

- b. Evidence that M.V. disclosed the allegations against her father to multiple people, years later, was inadmissible hearsay.

Hearsay is an out-of-court statement “offered in evidence to prove the truth of the matter asserted.” ER 801(c). Hearsay is inadmissible except as provided by the rules of evidence, other court rules, or by statute. ER 802.

A trial court’s interpretation of an evidentiary rule is reviewed de novo. State v. Foxhoven, 161 Wn.2d 168, 174, 163 P.3d 786 (2007). When the trial court has correctly interpreted the rule, the decision to admit evidence is reviewed for abuse of discretion. Id. Discretion is abused if it is exercised on untenable grounds or for untenable reasons. Id. “Failure to adhere to the requirements of an evidentiary rule can be considered an abuse of discretion.” Id.

- i. M.V.’s disclosures were not admissible under the fact of complaint doctrine because they were not timely and included details of the allegations, including Vargas’s identity.

One exception to the hearsay rule is the “fact of complaint” doctrine. State v. Debolt, 61 Wn. App. 58, 63, 808 P.2d 794 (1991). The doctrine permits the State in a sex offense case to present evidence that the victim made a timely complaint to someone after the assault. State v. Chenoweth, 188 Wn. App. 521, 532, 354 P.3d 13 (2015). This exception, however, is narrow and allows only the fact of the complaint and that it was “timely

made.” Id. Details of the complaint, “including the identity of the offender and the specifics of the act,” are not permitted. State v. Alexander, 64 Wn. App. 147, 151, 822 P.2d 1250 (1992).

Even an implied assertion of the perpetrator’s identity is inadmissible under the fact of the complaint doctrine. Id. at 153. In Alexander, the trial court admitted a counselor’s testimony that the complaining witness, M., filed a CPS complaint against only one individual. Id. M.’s counselor and mother also testified M. had spoken about “things” that happened at Alexander’s house. Id. On review, the court of appeals concluded this evidence “raised a virtually indisputable inference that in each instance [the witness] had identified Alexander as the abuser.” Id. The court agreed with Alexander that this evidence was not admissible under the fact of the complaint doctrine. Id.

Similarly, in State v. Ferguson, 100 Wn.2d 131, 135, 667 P.2d 68 (1983), the victim’s teacher testified they had a discussion “[o]utside my classroom in the hallway” and the “gist” of the discussion “concerned [the victim’s] father.” The Ferguson court held “the statement identifying the offender as the victim’s ‘father’ should not have been admitted.” Id. at 136.

The Chenoweth court recently recognized that “disclosures made nearly a year later cannot reasonably be considered ‘timely.’” 188 Wn. App. at 533; accord State v. Griffin, 43 Wash. 591, 86 P. 951 (1906) (“[W]here

there have been months of inexcusable delay, we think that justice demands that the complaint should be entirely excluded from the consideration of the jury.”).

Case law demonstrates the testimony regarding M.V.’s disclosures to Montgomery, K.V., and McIntosh was not admissible under the fact of complaint doctrine, because the disclosures were not timely, and the testimony revealed Vargas’s identity as well as details of the allegations. Specifically, there can be no real dispute that M.V.’s disclosures to Montgomery, her mother, and McIntosh were not timely. Her earliest disclosure was to Montgomery around November of 2015, more than three years after the alleged abuse in June to September of 2012.¹ RP 94. If one year is not timely, more than three years is certainly not timely.

The witnesses all testified M.V. identified her father as the perpetrator, forbidden under the fact of complaint doctrine. RP 219 (K.V.), 336 (Montgomery), 304-05 (McIntosh). They also improperly revealed details of M.V.’s disclosures. For instance, Montgomery testified what M.V. told her “was pretty much like eating [M.V.] up inside.” RP 336. K.V. testified M.V. was “shaking and crying” when she told K.V. that Vargas

¹ M.V. believed she told Montgomery about the allegations during their sophomore year. RP 142-43. Regardless, this was still more than a year after the alleged abuse, which is untimely under Chenoweth.

“had done something to her.” RP 219, 221. McIntosh likewise testified M.V.’s disclosure “alarmed” him. RP 304-05.

M.V.’s belated disclosures and the substance of those disclosures, including her identification Vargas as the perpetrator, were inadmissible under the fact of complaint doctrine.

- ii. Nor were M.V.’s disclosures admissible as statements of identification because they were not made after M.V. perceived her father and where identity was not at issue.

Though better characterized as fact of complaint, the trial court admitted M.V.’s disclosures “identifying the defendant as the perpetrator for identification purposes only.” CP 13. Under ER 801(d)(1)(iii), statements of identification, “made after perceiving the person,” are not hearsay.

Tegland explains this rule “is based upon the belief that an out-of-court statement of identification, which necessarily occurs closer in time to the witness’s perception of the person, is more reliable than a later identification in the courtroom.” 5B KARL B. TEGLAND, WASH. PRACTICE: EVIDENCE LAW & PRACTICE § 801.29 (6th ed. 2017). Thus, the rules allows for “an out-of-court statement identifying a person in a lineup, photograph, at the scene of a crime, or the like.” *Id.* (citing illustrative federal cases).

As applied in this case, there is an obvious conflict between the fact of complaint doctrine, which prohibits identification of the perpetrator, and

statements made for the purposes of identification. But there need not and should not be such a conflict, if admission (or exclusion) of such evidence is actually tethered to the language and purpose of the two hearsay exceptions.

Considering the dictionary definition of the word “perceive” is useful. “Perceive” means “to become conscious of”; “to recognize or identify esp. as a basis for or as verified by action”; and “to become aware of through the senses.” WEBSTER’S THIRD NEW INT’L DICTIONARY 1675 (1993). These definitions suggest “perceiving a person,” as required under the identification rule, means to become aware of or recognize a person. It does not broadly mean to name or accuse someone.

The case law on ER 801(d)(1)(iii) is consistent with this narrower view of “perceive,” like seeing the defendant at the crime scene and then identifying him to the police, in a photograph, or a lineup. See e.g., State v. McDaniel, 155 Wn. App. 829, 877-78, 877, 230 P.3d 245 (2010) (photomontage identification).

For instance, the State relied on Grover to argue for admission of M.V.’s disclosures identifying her father. CP 96-97. In Grover, a detective was allowed to testify that a woman present during a home invasion robbery identified the robbers, who were known to the woman, immediately after the incident. Grover, 55 Wn. App. at 254-55. The court held this statement of identification was properly admitted, declining to apply ER 801(d)(1)(iii) to

“only statements of identification made by a witness during a line-up or upon viewing a photographic montage.” Grover, 55 Wn. App. at 256-57.

The woman’s identification in Grover was made to the police immediately after perceiving the robbers. Id. at 254. In other words, she became aware of and recognized the individuals who robbed the house when she observed them doing so. This is consistent with the definition of “perceive.” It is also consistent with the purpose of the rule—statements of identification made soon after the incident are considered “more reliable than a later identification in the courtroom.” TEGLAND, supra, § 801.29.

What is not consistent with the identification rule is any accusation, made any time after the purported offense. This blurs the line between a more reliable, contemporaneous identification upon perceiving the person and an after-the-fact accusation. Indeed, were it so, exclusion of the perpetrator’s identity under the fact of complaint doctrine would be meaningless. Essentially all witness accusations made out of court would be admissible in court. The identification exception would swallow the hearsay rule.

Tegland notes this very problem, explaining “[a] few courts have stretched the rule to allow out-of-court statements that arguably identify a person (typically the defendant in a criminal case) but that really describe facts that occurred in the past and implicate the defendant in the crime

charged.” TEGLAND, supra, § 801.29. For instance, ““My friend John Doe robbed the bank on Tuesday night.”” Id. Tegland explains McCormick on Evidence “calls this interpretation of the rule ‘erroneous,’ saying it ‘ignores the purpose and language of the rule.’” Id. (citing MCCORMICK ON EVIDENCE § 251, at 218 (7th ed. 2013)).

McCormick on Evidence goes into more detail on this point. It explains the justification for the rule “is found in the unsatisfactory nature of courtroom identification and by the constitutional safeguards that regulate out-of-court identifications arranged by police.” MCCORMICK, supra, at 218 (footnotes omitted). McCormick emphasizes the rule should not be used to “allow[] testimony that a certain person, known to the witness, committed a crime.” Id. at 218 n.36.

A review of Washington cases addressing ER 801(d)(1)(iii) reveal they are consistent with McCormick’s noted justification for the rule. They involve “out-of-court identifications arranged by police” where identity is at issue, making a delayed courtroom identification unsatisfactory. See, e.g., McDaniel, 155 Wn. App. at 837-38 (police photomontage); State v. Stratton, 139 Wn. App. 511, 517, 161 P.3d 448 (2007) (describing defendant’s clothing to the police); State v. Jenkins, 53 Wn. App. 228, 232, 766 P.2d 499 (1989) (pointing out a photograph of the defendant to the police); Grover, 55 Wn. App. at 254 (statement to the detective). Applying the identification

rule in these more limited circumstances resolves the conflict with the fact of complaint doctrine.

M.V.'s "statements of identification" do not fall within the proper scope of ER 801(d)(1)(iii). She did not identify her father as the perpetrator shortly after perceiving or becoming aware of him for the first time. Rather, she accused her father, a person known to her for her entire life, of sexual abuse to Montgomery, her mother, and McIntosh, more than three years after the purported abuse. These were not police-arranged identifications where identity was at issue, but disclosures of a known person to friends and family.

Moreover, a courtroom identification would be entirely satisfactory in this case because identity was not at issue—M.V. obviously knew and could recognize her father. An out-of-court identification is of questionable relevance in a case where identity is not at issue. M.V.'s identifications were not offered to establish that Vargas, rather than someone else, abused M.V. Rather, the obvious reason for the testimony was to corroborate M.V.'s allegations that her father sexually abused her.

Testimony regarding M.V.'s disclosures falls on the improper accusation side of the line rather than the proper identification side of the line. Her statements were not an identification of a person in a lineup, photomontage, or similar type of reasonably contemporaneous identification

required by the rule. The fact of complaint doctrine does not allow identification of the perpetrator to a friend, family member, teacher, and so on, particularly when made years after the incident. Otherwise, the hearsay is simply bolstering the complaining witness's accusations.

The trial court admission of M.V.'s disclosures in this case stretches the identification rule beyond all recognition. To uphold admission of the evidence would essentially sanction witness testimony regarding out-of-court accusations made years after the fact. This Court must not ignore the language and purpose of ER 801(d)(1)(iii), as the trial court did. M.V. did not identify her father after perceiving him. Rather, she accused him of a crime. Her accusations were then repeated in court by Montgomery, M.V.'s mother, and McIntosh. This testimony was classic, inadmissible hearsay.

iii. No other hearsay exception applies.

The Chenoweth court identified another exception to the hearsay rule: “When a statement is not offered for the truth of the matter asserted, but is offered to show why an officer conducted an investigation, it is not hearsay and is admissible.” 188 Wn. App. at 533 (quoting State v. Iverson, 126 Wn. App. 329, 337, 108 P.3d 799 (2005)). M.V.'s disclosure to Detective Whitehead likely falls within this exception.

This exception does not, however, apply to Montgomery or K.V., who are not law enforcement and did not report M.V.'s allegations to law

enforcement. With regard to McIntosh, at most, the fact of disclosure was admissible to show why he called CPS, which triggered the investigation. He should not, however, been allowed to testify that M.V.'s disclosure "alarmed" him or that M.V. identified her father as the perpetrator. RP 304-05. This testimony went to the substance of M.V.'s disclosure, rather than just the reason for McIntosh's report to CPS.

Finally, ER 801(d)(1)(ii) provides that a prior statement of a witness is not hearsay when it is "consistent with the declarant's testimony and is offered to rebut an express or implied charge against the declarant of recent fabrication or improper influence or motive." This exception, like a statement of identification, is limited. Unless the defense directly argues the witness has recently fabricated her testimony, prior consistent statements may not be used to bolster it. Alexander, 64 Wn. App. at 152. In other words, "[t]he prior statement must have been made before a motive to falsify has arisen." State v. Bargas, 52 Wn. App. 700, 703, 763 P.2d 470 (1988).

A prior consistent statement was admissible in State v. Stark, 48 Wn. App. 245, 738 P.2d 684 (1987). There, defense counsel suggested that S., the victim, fabricated her story based on a book she read. Id. at 248. To rebut that inference, S.'s mother was allowed to testify that S. described the incident to her before S. received the book from her counselor. Id. Because S.'s statement to her mother was consistent with S.'s trial testimony and was

made *before* she received the book, it was “probative of her credibility” was properly admitted as a prior consistent statement. Id. at 249.

By contrast, a prior consistent statement was not admissible in Bargas. Bargas was accused of raping J.L. Bargas, 52 Wn. App. at 701. The trial court allowed a police officer to testify to the details of J.L.’s statement at her initial interview. Id. at 702. Defense counsel challenged J.L.’s credibility and attempted to reveal inconsistencies in her statements. Id. at 703. But counsel did not infer J.L. fabricated her story *after* her initial statements to the police officer. Id. Rather, the defense theory was that J.L. had fabricated her story from the inception, *before* her statements to the officer. Id. “The defense’s attempt to point out inconsistencies in the victim’s testimony did not raise an inference of recent fabrication.” Id. The prior consistent statements were not admissible. Id.

This exception does not apply here. First and foremost, the State readily acknowledged “the substantive details of M.V.’s disclosures are hearsay.” CP 96; see also RP 25 (emphasizing the witnesses “are not going to get into the substance or the details of her disclosures”). The trial court likewise noted the witnesses “can’t be giving any details.” RP 26. The State and the trial court likely recognized the inapplicability of this exception.

Defense counsel did not raise any inference of recent fabrication *after* M.V. disclosed to Montgomery, her mother, or McIntosh. Rather, like

in Bargas, the defense theory was that M.V. fabricated the allegations from the outset or at least before she disclosed to anyone. Counsel speculated M.V. made up the accusations to get closer to her mother or to seek her mother's attention. RP 477-78. But there was no suggestion M.V. fabricated the allegations after her initial disclosures.

M.V. claimed she did not tell anyone about the abuse because she did not want to break up her family or ruin her parents' marriage. RP 147, 176-77. Defense counsel cross-examined M.V. about how she knew by her junior year that her parents were unhappy and her mother wanted a divorce. RP 176-77. In closing, defense counsel pointed out M.V. knew all along, and before she made any disclosures, that her mother wanted a divorce. RP 470-71, 477. This undercut M.V.'s claim that she waited to disclose because she did not want to break up her family. But, M.V. knew about her parents' marital trouble *before* she disclosed the allegations to anyone. Defense counsel did not insinuate M.V. developed this motive to fabricate *after* she disclosed the allegations.

There was no basis to admit the fact of M.V.'s disclosures or identification of her father as prior consistent statements. The testimony regarding her disclosures to Montgomery, K.V., and McIntosh was hearsay. The trial court erred in admitting the evidence where no hearsay exception applies.

- c. The fact that M.V. disclosed to several individuals impermissibly bolstered her credibility, causing irreparable harm to Vargas.

Evidentiary error requires reversal when there is a reasonable probability that the error affected the outcome of the trial. State v. Neal, 144 Wn.2d 600, 611, 30 P.3d 1255 (2001). “[A] ‘reasonable probability’ is lower than a preponderance standard. Rather, it is a probability sufficient to undermine confidence in the outcome.” State v. Estes, 188 Wn.2d 450, 458, 395 P.3d 1045 (2017) (citations omitted).

“[M]ere repetition does not imply veracity.” State v. Harper, 35 Wn. App. 855, 858, 670 P.2d 296 (1983) (quoting 4 J. WEINSTEIN, EVIDENCE ¶ 801(d)(1)(B)[01], 801–116 (1981)). Therefore, “[a] witness may not fortify his testimony or magnify its weight by showing that he has previously told the same story on another occasion out of court.” State v. Lynch, 176 Wash. 349, 351, 29 P.2d 393 (1934). If this were permitted, “garrulity would supply veracity.” Id. at 351-52.

Particularly when the State alleges sexual misconduct, repetition of testimony is “highly prejudicial, perhaps devastating” to the defense. Harper, 35 Wn. App. at 858. Permitting multiple witnesses to testify about the complaining witness’s allegations allows the State to unfairly multiply the impact of its evidence. See State v. Pendleton, 8 Wn. App. 573, 575-76, 508 P.2d 179 (1973) (hearsay supporting testimony of State’s witness

improperly admitted; conviction reversed because repetition helped to “double the impact”).

Identity was not at issue in this case. Nevertheless, the case boiled down to whether M.V.’s accusations were credible. The fact that she repeated those accusations to multiple people—her best friend, her mother, her school counselor—and identified her father as the perpetrator, served to impermissibly bolster her credibility and corroborate her testimony. RP 457-60 (State emphasizing in closing M.V.’s disclosures to Montgomery, her mother, and McIntosh). So did the little details each witness provided regarding M.V.’s disclosure.

For instance, Montgomery said she “could tell it was pretty much like eating [M.V.] up inside.” RP 336. Montgomery also testified M.V. made her promise not to tell anyone, which suggested M.V.’s lack of motive for fabricating. RP 336, 457 (State arguing in closing this indicated lack of motive). K.V., too, described M.V. as “shaking and crying” when she told K.V. that that her father “had done something to her.” RP 219. McIntosh testified M.V. disclosed to him only after he reminded her he was a mandatory reporter, which further suggested M.V. was truthful or at least cognizant of the consequences of her allegations. RP 305-06. And, perhaps worse of all, McIntosh repeatedly testified M.V.’s disclosure “alarmed” him.

RP 304-05. These details further bolstered M.V.'s credibility, which was really the sole issue before the jury.

In a case with no corroborating evidence, like here, the three belated disclosures caused irreparable harm to Vargas. They were not simply cumulative with Detective Whitehead's testimony regarding M.V.'s disclosure, because of the harmful details each witness added and the fact of disclosure to multiple people. There is a reasonable probability that the improperly admitted hearsay prejudiced the outcome of Vargas's trial. This Court should reverse and remand for a new trial.

3. THE TRIAL COURT ERRED IN ADMITTING ADDITIONAL HEARSAY OF A PREJUDICIAL TEXT MESSAGE M.V. SENT TO HER FATHER.

Before trial, the State also moved to admit text messages between M.V. and her father as statements by a party opponent under ER 801(d)(2). CP 106-07; RP 39-40, 43. Defense counsel objected, arguing "I think it would be hard for anyone to say that it's an admission by a party opponent. There's nothing in here saying, yes, I did these things. There's no actually overt here's what you did to me, in terms of explicit language." RP 40. The trial court admitting the text messages, pending authentication, which the State later established. RP 45, 124.

The text messages included one M.V. sent to her father on December 17, 2015 that read, "I honestly just lost most of my respect for you after you

did what you did. My whole life has changed and perspective because of that. I see no value anymore.” Ex. 1; RP 139-40. No response from Vargas was included in the exhibit and M.V. did not testify how Vargas responded.

This text message was hearsay: it was M.V.’s out-of-court statement used to prove the truth of the matter asserted, that her father sexually abused her. It was not Vargas’s “own statement,” which would make it admissible as an admission by a party opponent under ER 801(d)(2)(i). There is no record of Vargas’s response. He made no statement and admitted nothing.

Nor is there any evidence that Vargas made an adoptive admission of M.V.’s accusation. ER 801(d)(2)(ii) specifies a statement is not hearsay when the opposing party “has manifested an adoption or belief in its truth.” A party may manifest adoption of a statement in words or gestures. State v. Neslund, 50 Wn. App. 531, 550, 749 P.2d 725 (1998). Vargas clearly did not manifest adoption of M.V.’s text message by words or gestures, because he did not respond.

A party can also manifest adoption of a statement by silence. Id. “Because of the inherently equivocal nature of silence, however, such evidence must be received with caution.” Id. at 551. Silence constitutes an admission only if “(1) the party-opponent heard the accusatory or incriminating statement and was mentally and physically able to respond; and (2) the statement and circumstances were such that it is reasonable to

conclude the party-opponent would have responded had there been no intention to acquiesce.” Id.

Vargas did not manifest his adoption of M.V.’s statement by silence. A person might not respond to a text message for any number of innocuous reasons. No evidence established Vargas was capable of responding. Perhaps Vargas was driving and physically unable to respond. Indeed, M.V. explained her father “wasn’t trying to text” because he was picking up her nephew at the time. RP 139.

Nor is there any evidence that Vargas actually received the text message. Again, M.V. did not testify to any response Vargas made, whether in writing, over the phone, or in person. It cannot be said, then, that Vargas “heard the accusatory or incriminating statement.” Perhaps Vargas broke his phone or was getting a new phone, as M.V. testified he often did. See, e.g., RP 145 (“Me and my dad were always getting new phones all the time.”), 161 (“We were always breaking them. I guess we were just really hard on phones.”). M.V.’s text message was simply sent out in the ether, without any kind of response whatsoever from Vargas. This cannot be an adoptive admission. It was hearsay.

The error in admitting M.V.’s unanswered text message was prejudicial, for all the same reasons discussed above in sections 1.b. and 2.c. M.V.’s credibility was the key issue at trial. The jury saw, in writing, that

M.V. accused her father directly; the experience changed her “whole life”; and she saw “no value” in life anymore. Ex. 1. Even though Vargas did not adopt the admission, as required by law, the jury undoubtedly assumed the worst: that his silence constituted an admission that M.V.’s allegations were true. Again, in a case with so little corroborating evidence, anything could have tipped the scales. Reversal of Vargas’s convictions and remand for a new trial is necessary for this additional reason.

4. CUMULATIVE ERROR DEPRIVED VARGAS OF HIS RIGHT TO A FAIR TRIAL.

Where several errors standing alone do not warrant reversal, the cumulative error doctrine requires reversal when the combined effect of the errors denied the accused a fair trial. State v. Coe, 101 Wn2.d 772, 789, 684 P.2d 668 (1984). The outcome of this case depended on whether the jury believed M.V.’s accusations. The combined effect of the above-described errors served to bolster M.V.’s credibility: her own mother believed her; she disclosed the allegations to several people; she repeatedly identified her father as the perpetrator; and she directly accused her father of the crimes, without a response. The cumulative impact of improperly admitted evidence warrants reversal of Vargas’s convictions. State v. Venegas, 155 Wn. App. 507, 527, 228 P.3d 813 (2010).

5. SEVERAL COMMUNITY CUSTODY CONDITIONS SHOULD BE STRICKEN BECAUSE THEY ARE NOT CRIME-RELATED.

Sentencing courts have authority to require offenders to comply with “any crime-related prohibitions” during the course of community custody. RCW 9.94A.703(3)(f); see also RCW 9.94A.505(9) (“As a part of any sentence, the court may impose and enforce crime-related prohibitions and affirmative conditions as provided in this chapter.”). A “crime-related prohibition” is “an order of a court prohibiting conduct that directly relates to the circumstances of the crime for which the offender has been convicted.” RCW 9.94A .030(10).

A sentencing court’s imposition of crime-related community custody conditions is reviewed for abuse of discretion. State v. Irwin, 191 Wn. App. 644, 656, 364 P.3d 830 (2015). Appellate courts review the factual bases for crime-related conditions under a “substantial evidence” standard. Id.

In State v. Zimmer, Zimmer was convicted of methamphetamine possession. 146 Wn. App. 405, 410-11, 190 P.3d 121 (2008). The trial court imposed a community custody condition prohibiting her possession of cellular phones and data storage devices. Id. at 411. The appellate court reversed, holding the condition did not directly relate to Zimmer’s crimes. Id. at 413. Though such devices may be used to further illegal drug possession, the court explained, there was no evidence in the record (1) that

Zimmer possessed a cell phone or data storage device in connection with possessing methamphetamine, or (2) that she intended to distribute or sell methamphetamine using such devices. Id. at 414.

In State v. O’Cain, O’Cain was convicted of second degree rape. 144 Wn. App. 772, 774, 184 P.3d 1262 (2008). As a condition of community custody, the trial court prohibited O’Cain from accessing the internet without prior approval from his CCO and sex offender treatment provider. Id. at 774. The appellate court struck the condition, reasoning:

There is no evidence in the record that the condition in this case is crime-related. There is no evidence that O’Cain accessed the internet before the rape or that internet use contributed in any way to the crime. This is not a case where a defendant used the internet to contact and lure a victim into an illegal sexual encounter. The trial court made no finding that internet use contributed to the rape.

Id. at 775. Similarly, in State v. Johnson, 180 Wn. App. 318, 330-31, 327 P.3d 704 (2014), this Court struck an internet-related condition because “there [were] no findings suggesting any nexus between [the defendant’s] offense and any computer use or Internet use.”

By contrast, in State v. Riley, restriction on Riley’s computer use was crime-related because he was convicted of computer trespass and was a “self-proclaimed computer hacker.” 121 Wn.2d 22, 36-37, 846 P.2d 1365 (1993). In Irwin, a prohibition on possessing a computer or computer-related device was crime-related where the record contained evidence “that

Irwin took and stored pornographic images as part of his of molesting underage females.” 191 Wn. App. at 658. Similarly, in State v. Kinzle, the court upheld a condition prohibiting Kinzle from dating women with minor children or forming relationships with families who have minor children because the his victims were “children with whom he came into contact through a social relationship with their parents.” 181 Wn. App. 774, 785, 326 P.3d 870 (2014).

Several of the conditions imposed in Vargas’s case are not crime-related. For instance, the trial court imposed the following condition, number 23: “No internet access or use, including email, without prior approval of the supervising CCO.” CP 92. The court also imposed condition 24: “No use of a computer, phone, or computer-related device with access to the Internet or on-line computer service except as necessary for employment purposes (including job searches).” CP 92.

O’Cain is directly on point. There is no evidence in the record that Vargas used the internet, e-mail, or a computer to perpetrate the offenses against his daughter. M.V. testified all the incidents occurred in her parents’ bedroom or bathroom. RP 84-87. She claimed her father showed her a DVD containing pornography, but there was no allegation that he used the internet before or during the rapes, or that the internet facilitated the offenses in any way. RP 94-96. The same is true of a computer.

M.V. testified that once during the charging period her father showed her a video on his phone of a woman performing fellatio on a horse. RP 96-97. Again, however, there was no insinuation that this involved the internet or a computer. The only possibly crime-related aspect of the two conditions would be prohibiting Vargas's possession of a cell phone.

Finally, there was a suggestion M.V. accidentally saw pornography on her father's cell phone sometime in January or February of 2016. RP 399-401, 406. However, this occurred well after the charged incidents and, by all accounts, was entirely accidental. There was no suggestion in the record that Vargas purposefully showed his daughter pornography at this significantly later date. And, again, there is no link between pornography on Vargas's phone and a condition barring internet or computer use.

Notably, the United States Supreme Court has held conditions restricting a sex offender's access to all social networking sites violates the First Amendment. In Packingham v. North Carolina, __U.S.__, 137 S. Ct. 1730, 1737, 198 L. Ed. 2d 273 (2017), the Court struck down a North Carolina statute that made it a felony for a registered sex offender to gain access to a number of websites, including common social media websites, like Facebook and Twitter. The Court held the prohibition was unconstitutional, emphasizing "the State may not enact this complete bar to

the exercise of First Amendment rights on websites integral to the fabric of our modern society and culture.” Id. at 1738.

Packingham demonstrates courts must take particular care in evaluating conditions, like those here, that may burden sensitive First Amendment freedoms. State v. Bahl, 164 Wn.2d 739, 757-58, 193 P.3d 678 (2008). Such conditions must be “narrowly tailored and directly related to the goals of protecting the public and promoting the defendant’s rehabilitation.” Id. at 757. Barring Vargas’s access to the internet, e-mail, and computers fails both this heightened standard and the lower crime-relatedness standard, where there was no nexus between Vargas’s offenses and any internet or computer use. The conditions should be stricken.

The trial court also imposed condition 18: “Stay out of areas where children’s activities regularly occur or are occurring,” and provided several examples like daycare facilities, playgrounds, and sports fields being used for youth sports. CP 92. This condition is likewise not crime-related. As discussed, all the alleged incidents occurred in Vargas’s bedroom or bathroom with his biological daughter. There were no allegations whatsoever that Vargas lurked in areas like playgrounds or arcades, searching for a victim. Nor was there any suggestion Vargas used such locations to facilitate the convicted offenses.

Conditions like the one imposed here can be particularly difficult to comply with. For instance, in State v. McCormick, 166 Wn.2d 689, 692, 213 P.3d 32 (2009), the sentencing court required that McCormick “not frequent areas where minor children are known to congregate.” His special sex offender sentencing alternative (SSOSA) was ultimately revoked when he went to a food bank that happened to be in the same building as a grade school. Id. at 693-96.

Again, courts must be careful to impose only crime-related prohibitions. The restriction on Vargas going to “areas where children’s activities regularly occur or are occurring” does not meet that standard, where there is no nexus between such locations and the convicted crimes. This condition should likewise be stricken.

Finally, the trial court ordered Vargas to “not use or consume alcohol.” CP 91 (condition 11). RCW 9.94A.703(3)(e) permits sentencing courts to prohibit offenders “from possessing or consuming alcohol.” However, as the court of appeals recently recognized, *using* alcohol is different than *consuming* alcohol. State v. Norris, 1 Wn. App. 2d 87, 99-100, 404 P.3d 83 (2017), review granted on other grounds, 190 Wn.2d 1002 (2018). The statute authorizes restriction only on “consuming alcohol.” There is no evidence in the record that Vargas used alcohol in any way in the

commission of the offenses. The word “use” should be stricken from condition 11.

This Court should strike the four challenged community custody conditions (11, 18, 23, and 24) and remand to the trial court for resentencing. O’Cain, 144 Wn. App. at 775.

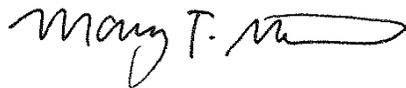
D. CONCLUSION

For the reasons stated above, this Court should reverse Vargas’s convictions and remand for a new trial. Alternatively, this Court should strike several community custody conditions and remand for resentencing.

DATED this 25th day of April, 2018.

Respectfully submitted,

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