

FILED
Court of Appeals
Division II
State of Washington
3/20/2019 10:35 AM

NO. 51249-1-II

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

STATE OF WASHINGTON,

Respondent,

v.

NATASHIA BRITT,

Appellant.

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

The Honorable Grant Blinn, Judge

SECOND AMENDED BRIEF OF APPELLANT

KEVIN A. MARCH
Attorney for Appellant

NIELSEN, BROMAN & KOCH, PLLC
1908 E Madison Street
Seattle, WA 98122
(206) 623-2373

TABLE OF CONTENTS

	Page
A. <u>ASSIGNMENTS OF ERROR</u>	1
<u>Issues Pertaining to Assignments of Error</u>	2
B. <u>STATEMENT OF THE CASE</u>	5
1. <u>Evidence presented as to the charges</u>	5
2. <u>Juror 26 indicates she was not capable of remembering evidence presented in the course of a three-week trial and no one neutralizes, mitigates, or clarifies this statement</u>	9
3. <u>Missing witness Regina Golden and the denial of defense evidence regarding Regina Golden that was intended to attack the credibility of prosecution witnesses</u>	9
4. <u>The State’s elicitation of evidence that numerous jail phone recordings had been redacted and would not be shared with the jury</u>	12
5. <u>Verdicts, judgment, sentence, and appeal</u>	13
C. <u>ARGUMENT</u>	14
1. COGNITIVE INABILITY TO SERVE AS A JUROR EXPRESSED BY A JUROR SEATED FOR BRITT’S TRIAL VIOLATED BRITT’S JURY TRIAL RIGHT	14
2. THE TRIAL COURT’S PLACEMENT OF LIMITATIONS ON BRITT’S CROSS EXAMINATION OF SEVERAL WITNESSES REGARDING THE WHEREABOUTS OF SUBPOENAED MATERIAL WITNESS REGINA GOLDEN DEPRIVED BRITT OF HER CONSTITUTIONAL RIGHT TO ADVANCE HER DEFENSE BY CHALLENGING THE CREDIBILITY OF THE STATE’S WITNESSES	19

TABLE OF CONTENTS (CONT'D)

	Page
3. THE COURT ERRED IN ADMITTING EVIDENCE THAT PITTED THE DISCIPLINARY ACTIONS OF B.C.'S AUNT AND TEMPORARY CAREGIVER AGAINST BRITT'S DISCIPLINARY ACTIONS.....	32
4. THE PROSECUTOR'S INTRODUCTION OF EXCLUDED EVIDENCE—THE LENGTH OF REDACTED JAIL PHONE RECORDINGS—WAS MISCONDUCT INTENDED TO PORTRAY BRITT AND HER LEGAL TEAM AS HIDING EVIDENCE FROM THE JURY, THEREBY DERPVIED HER OF A FAIR TRIAL	34
5. INEFFECTIVE ASSISTANCE RESULTING FROM COUNSEL'S FAILURE TO OBJECT TO EVIDENCE INADMISSIBLE UNDER THE CHILD HEARSAY STATUTE REQUIRES REVERSAL OF THE COMMUNICATION WITH A MINOR FOR IMMORAL PURPOSES AS TO BRITT'S YOUNGER SON, B.C.	41
a. <u>Counsel's performance was deficient</u>	42
b. <u>The erroneous admission of child hearsay caused significant prejudice as to the communication with a minor for immoral purposes count as to B.C.</u>	47
6. THE DNA COLLECTION FEE AND THE CRIMINAL FILING FEE MUST BE STRICKEN FROM BRITT'S JUDGMENT AND SENTENCE BASED ON INDIGENCY Error! Bookmark not defined.	
7. THE TRIAL COURT ERRED IN IMPOSING SENTENCING CONDITIONS BARRING CONTACT BETWEEN BRITT AND HER CHILDREN AND REQUIRING BRITT TO UNDERGO A PSYCHOSEXUAL EVALUATION	52
a. <u>The lifetime no-contact order between Britt, her sons, and "any minors" violates her right to parent and her right</u>	

to have limited contact with her children..... 52

TABLE OF CONTENTS (CONT'D)

Page

b. The record shows that the trial court did not intend to impose a phschosexual evaluation, yet such was erroneously included in the judgment and sentence 56

c. Although the trial court entered an order to amend the judgment and sentence to allow Britt contact with her children and to strike the psychosexual evaluation, this order is worthless under recent Division Two precedent because the Department of Corrections did not participate 57

D. CONCLUSION..... 62

TABLE OF AUTHORITIES

	Page
<u>WASHINGTON CASES</u>	
<u>In re Pers. Restraint of Rainey</u> 168 Wn.2d 367, 229 P.3d 686 (2010).....	53, 54, 55
<u>In re Pers. Restraint of Yung-Cheng Tsai</u> 183 Wn.2d 91, 351 P.3d 188 (2015).....	42
<u>In re Pers. Restraint of Gossett</u> ___ Wn. App. 2d ___, 435 P.3d 314 (2019).....	2, 5, 57, 58, 59, 60
<u>State v. Ancira</u> 107 Wn. App. 650, 27 P.3d 1246 (2011).....	54
<u>State v. Armendariz</u> 160 Wn.2d 106, 56 P.3d 201 (2007).....	53
<u>State v. Belgarde</u> 110 Wn.2d 504, 755 P.2d 174 (1988).....	35
<u>State v. Brett</u> 126 Wn.2d 136, 892 P.2d 29 (1995).....	14
<u>State v. Crawford</u> 159 Wn.2d 86, 147 P.3d 1288 (2006).....	43
<u>State v. Davis</u> 175 Wn.2d 287, 290 P.3d 43 (2012).....	14
<u>State v. Easter</u> 130 Wn.2d 228, 922 P.2d 1295 (1996).....	31
<u>State v. Estes</u> 188 Wn.2d 450, 395 P.3d 1045 (2017).....	41, 42
<u>State v. Irby</u> 187 Wn. App. 183, 347 P.3d 1103 (2015).....	14, 16, 17, 18

TABLE OF AUTHORITIES (CONT'D)

	Page
<u>State v. Jones</u> 144 Wn. App. 284, 183 P.3d 307 (2008),.....	39
<u>State v. Jorden</u> 103 Wn. App. 221, 11 P.3d 866 (2000).....	16
<u>State v. Kyлло</u> 166 Wn.2d 856, 215 P.3d 177 (2009).....	42
<u>State v. Lawler</u> 194 Wn. App. 275, 374 P.3d 278 <u>review denied</u> , 186 Wn.2d 1020, 383 P.3d 1027 (2016)	17, 18, 19
<u>State v. Martin</u> 171 Wn.2d 521, 252 P.3d 872 (2011).....	38
<u>State v. McFarland</u> 127 Wn.2d 322, 899 P.2d 1251 (1995).....	42
<u>State v. Monday</u> 171 Wn.2d 667, 257 P.3d 551 (2011).....	35
<u>State v. Parris</u> 98 Wn.2d 140, 654 P.2d 77 (1983).....	20
<u>State v. Pierce</u> 169 Wn. App. 533, 280 P.3d 1158 (2012).....	36, 40
<u>State v. Ramirez</u> 191 Wn.2d 732, 426 P.3d 714 (2018).....	50, 51
<u>State v. Reed</u> 102 Wn.2d 140, 684 P.2d 699 (1984).....	35
<u>State v. Smith</u> 189 Wash. 422, 65 P.2d 1075 (1937)	35
<u>State v. Stith</u> 71 Wn. App. 14, 856 P.2d 415 (1993).....	35

TABLE OF AUTHORITIES (CONT'D)

	Page
<u>State v. Wallin</u> 166 Wn. App. 364, 269 P.3d 1072 (2012).....	38, 39
<u>State v. Warren</u> 165 Wn.2d 17, 195 P.3d 940 (2008).....	53
<u>State v. Weaville</u> 162 Wn. App. 801, 256 P.3d 426 (2011).....	33
 <u>FEDERAL CASES</u>	
<u>Berger v. United States</u> 295 U.S. 78, 55 S. Ct. 629, 79 L. Ed. 1314 (1935).....	34
<u>Chambers v. Mississippi</u> 410 U.S. 284, 93 S. Ct. 1038, 35 L. Ed. 2d 297 (1973).....	20
<u>Davis v. Alaska</u> 415 U.S. 308, 94 S. Ct. 105, 39 L. Ed. 2d 347 (1974).....	21
<u>Hughes v. United States</u> 258 F.3d 453 (6th Cir. 2001)	14
<u>Santosky v. Kramer</u> 445 U.S. 745, 102 S. Ct. 1388, 71 L. Ed. 2d 599 (1982).....	53
<u>Strickland v. Washington</u> 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984).....	41, 43
<u>Taylor v. Louisiana</u> 419 U.S. 522, 95 S. Ct. 692, 42 L. Ed. 2d 690 (1975).....	14
 <u>RULES, STATUTES AND OTHER AUTHORITIES</u>	
3A J. WIGMORE, EVIDENCE § 940 (Chadborun rev. 1970).....	21
Engrossed Second Substitute House Bill 1783, 65th Leg., Reg. Sess. (Wash. 2018).....	50, 51

TABLE OF AUTHORITIES (CONT'D)

	Page
ER 401	33, 36
ER 402	33, 36
ER 403	12, 36, 37
LAWS OF 2018, ch. 269, § 17.....	51
LAWS OF 2018, ch. 269, § 18.....	50
Persistent Offender Accountability Act (POAA)	42, 43
RAP 10.6.....	60
RAP 7.2.....	2, 5, 61
RCW 2.36.110	15, 16
RCW 9A.44.010	44
RCW 9.94A.505	53
RCW 9.94A.570	42
RCW 9A.04.110	43, 44, 46
RCW 9A.44.010	45
RCW 9A.44.120.....	4, 41, 43, 45
RCW 10.101.010	51
RCW 36.18.020	51
RCW 43.43.754	50
RCW 43.43.7541	50

TABLE OF AUTHORITIES (CONT'D)

	Page
Sentencing Reform Act of 1981	53
U.S. CONST. amend. VI.....	14, 20
U.S. DEP'T OF HEALTH & HUMAN SERVS., OFFICE OF THE ASST. SEC'Y FOR PLANNING & EVALUATION, <u>Poverty Guidelines (2018)</u>	51
CONST. art. I, § 21	14
CONST. art. I, § 22	14, 20, 38, 41

A. ASSIGNMENTS OF ERROR

1. The trial court erred in failing to fulfill its mandatory duty to excuse a juror who was either inattentive or had a mental or physical defect that made her unfit for jury service.

2. The trial court erred in restricting Natashia Monique Britt's cross examination, denying her the opportunity to elicit relevant evidence to challenge the credibility of several state witnesses, including her accusers.

3. The trial court erred in allowing the State to present irrelevant evidence that another person who temporarily cared for Britt's children never wanted to impose physical discipline.

4. Prosecutorial misconduct—eliciting evidence that the majority of Britt's jail phone recordings had been redacted—deprived Britt of fair trial.

5. Ineffective assistance of counsel in failing to object to inadmissible evidence allowed prejudicial child hearsay evidence pertaining to one of the communication with a minor for an immoral purposes counts to be admitted, requiring reversal of this conviction.

6. The trial court erred in imposing the \$100 DNA collection fee and the \$200 criminal filing fee in light of the prospective application of new statutes pertaining to these legal financial obligations (LFOs).

7a. The trial court erred in imposing a lifetime no-contact order between Britt and “any minor,” with her younger son, B.C., and in imposing a 10-year no-contact order with her older son, J.B., given that the trial court made no attempt to narrowly tailor this curtailment on Britt’s fundamental right to parent.

7b. The trial court erred in imposing a psychosexual evaluation in the judgment and sentence given that it expressly stated at sentencing that it lacked authority to impose the condition and attempted to strike the requirement from one portion of the judgment and sentence but not the other.

7c. The trial court entered an order amending Britt’s judgment and sentence to permit contact between Britt and her children pursuant to an open adoption agreement and to strike the psychosexual evaluation. However, the trial court nonetheless erred because its order was entered without RAP 7.2 authority and has no binding effect on the Department of Corrections pursuant to this court’s recent decision, In re Personal Restraint of Gossett, ___ Wn. App. 2d ___, 435 P.3d 314 (2019).

Issues Pertaining to Assignments of Error

1. One of the jurors seated for Britt’s case stated in voir dire that she had a poor memory, that she could not remember details over the course of a lengthy trial, and that neither notetaking nor discussing the case with other jurors would aid her ability to retain information related to the

evidence presented at trial. No one followed up to ensure this juror was actually cognitively capable of serving. Does the seating of a juror who expressed a total inability to remember evidence presented in the case require reversal and a new trial where the juror's expressions of cognitive inability were never neutralized or mitigated in any way?

2. Britt sought to introduce evidence that an absent state witness whom many other witnesses (including Britt's children) claimed was living out of state was actually living with these other witnesses in Washington. Britt's proposed evidence included that the absent witness, who was the sole parent of an 11-year-old child, had left her child in the care of others for more than three months. The proposed evidence also included that the absent witness refused to undergo a background check and/or would fail a background check required to be a caregiver to Britt's children. By denying Britt the opportunity to present this evidence to attack the credibility of several witnesses, did the trial court deprive Britt of her constitutional rights to cross-examine witnesses and present her defense?

3. During the testimony of Linda Rogers, one of the former caregivers of Britt's children, the State was permitted to elicit evidence over Britt's relevancy objection that Rogers never wanted to physically discipline B.C. Was this evidence both irrelevant and prejudicial because it unfairly undermined Britt's claim of lawful physical discipline?

4. Despite the fact that the State and Britt agreed to present redacted versions of Britt's jail call recordings, the State elicited evidence that the vast majority of the calls' contents had been redacted. Although the trial court eventually sustained Britt's objection to evidence of redactions, did the prosecutor commit reversible misconduct by alerting the jury to significant evidence that had been excluded and thereby suggesting that Britt and her legal team were hiding inculpatory evidence from the jury?

5. Defense counsel did not object to the sole cogent evidence that Britt had communicated with B.C. for an immoral purpose. Such evidence was inadmissible under the child hearsay statute, RCW 9A.44.120. Did counsel's failure to object constitute ineffective assistance of counsel?

6. In light of the Washington Supreme Court's recent pronouncement that amendments to LFO statutes apply prospectively to cases currently pending on direct appeal, must the \$200 criminal filing fee and the \$100 DNA collection fee be stricken from Britt's judgment and sentence?

7. The trial court initially prohibited all contact between Britt and her children in the judgment and sentence. The trial court, despite contrary statements at sentencing and in the judgment and sentence itself, imposed a condition that Britt undergo a psychosexual evaluation and related treatment. The trial court later issued an order correcting the judgment and sentence to strike the psychosexual evaluation requirement and allow contact between

Britt and her children pursuant to an open adoption agreement she entered. Is the trial court's order completely worthless under this court's Gossett decision given that the Department of Corrections did not participate in the hearing that resulted in the order and given that the trial court did not seek the appellate court's permission pursuant to RAP 7.2?

B. STATEMENT OF THE CASE

The State charged Britt with first degree child assault against her younger son, B.C.; two counts of second degree child assault, one each against both sons J.B. and B.C.; two counts of communication with a minor for immoral purposes, one count for each J.B. and B.C.; first degree child molestation against B.C.; and sexual exploitation of a minor against B.C.¹ CP 63-66.

1. Evidence presented as to the charges

The State elected particular acts to support its charges for the first and second degree child assaults against B.C. and to support its communication with a minor for immoral purposes charge as to J.B. See CP 147-48 (jury instruction providing the evidence for each of these counts the "State relies upon" in alleging the crimes)

¹ Britt provides general factual background in this section but does not discuss much of the evidence presented pertaining to the child molestation or sexual exploitation given that Britt was acquitted of these charges. CP 170, 172.

For the first degree assault charge, both J.B. and B.C. testified that Britt had looked on YouTube “and she did something to [B.C.’s] neck and he passed out and she told me to go get some water, and I handed her the water. She splashed his face and he work up and he was crying.” RP 1057. According to J.B., Britt and J.B. kept trying to shake B.C. and B.C. wouldn’t wake up until they splashed water on him. RP 1059. According to B.C., Britt said, “Com here. So then she choked me. She told me to hold my breath, then she choked me” “[a]nd then I passed out.” RP 1226. B.C. said he was already starting to wake up when he heard his mother to J.B. to get some water. RP 1228-29. When B.C. woke up, he was leaning against the dresser and then proceeded to play games on the tablet. RP 1229-31.

For the second degree child assault charge against B.C., J.B. testified Britt taped B.C.’s mouth, arms, and legs with clear duct tape while B.C. was naked and whipped him with a wire “a lot of times.” RP 1050-54. J.B. stated he saw bruises on B.C.’s back, buttocks, and hamstring. RP 1054. B.C. also testified that Britt taped “my mouth, my arm, my leg, and then she started whooping me with a wire” and “She got the tape out -- where the laundry stuff, there was tape, and then she got it started taping me.” RP 1204-06. B.C. pointed to scars on his back caused by when “She whooped me.” RP 1221-22.

For the communication with a minor for immoral purposes charges as to J.B., J.B. testified that his mother showed him pornography: “she showed me two girls putting their fingers in their mouth puking, and then they were pooping and putting it back in their mouth, and there’s two girls and they were just kissing each other while they were doing it too.” RP 1062. J.B. believed the video was called “something like *Two Girls One* -- something, or one -- it just has something to ‘two girls’ in it.” RP 1063. According to the State’s detective, J.B. referred to *Two Girls, One Cup*, which was a video where one woman defecates into a cup alongside another woman, both women start eating the feces, regurgitating the feces, and “forcing themselves to vomit on each other and into each other’s mouths with the material that they had ingested.”² RP 1805-06.

As for the second degree child assault charge as to J.B., J.B. testified, “I was getting whoopings with the cable cord wire.” RP 1044. J.B. stated he would remove clothes, Britt would tell them to turn around, and then they would be whipped with the wife. RP 1044-45. The pain lasted for an hour or two and J.B. could not say whether it resulted in bruising. RP 1046. J.B. stated this happened more than three times. J.B. also described an incident when he got in a fight at school, didn’t win the fight, and “got a whooping for

² The parties stipulated to permitting the detective’s description of the video rather than showing the jury the actual *Two Girls, One Cup* video. RP 895; CP 36-37.

it.” RP 1045. He described another incident when he was living with his Aunt Linda Rogers where Britt “smacked me on my arm. I had a bruise, and she told me to wear a long-sleeve shirt so that no one would see it.” RP 1049.

For the communication with a minor for immoral purposes charge as to B.C., the State relied on various evidence. B.C. stated Britt showed him pictures on her phone he did not want to see: “Like it was a like a pickle -- the pickle jar” “And it says the D word on it,” which “means like the private part or something” “[l]ike when you go number one.” RP 1231-32. The State’s detective described photos found on Britt’s phone in which a person with a Tweety Bird tattoo like Britt’s appears to be grabbing and placing her mouth on a penis. RP 947-49, 956. B.C. also indicated that “sometimes she breastfeeds me” and forced him to drink her breastmilk when he thought he was five or younger. RP 1239, 1259-61.

Britt’s defense to the assault charges was lawful discipline. CP 131 (instruction on lawful discipline). To undermine this defense, the State presented evidence over a relevancy objection that one of B.C.’s other caregivers, his aunt Linda Rogers, never wanted to physically discipline B.C. RP 1336-37. Britt also attempted to challenge her children’s credibility as to their allegations, eliciting evidence that B.C. had lied and had a reputation for being dishonest. RP 1202 (B.C.’s testified he lied about getting a cut on his leg); RP 1935, 1965-66 (reputation for dishonesty evidence).

2. Juror 26 indicates she was not capable of remembering evidence presented in the course of a three-week trial and no one neutralizes, mitigates, or clarifies this statement

During voir dire, the State asked, “anyone here who says, you know what, even if I take notes, I’m not going to be able to retain this evidence over the course of three weeks? Anyone here feel that? It’s okay, we just need to know that.” RP 734. Juror 26 spoke up indicating she was not good at taking notes. RP 734. The prosecutor interrupted her and asked, “So what if you’re able to afterwards talk with other jurors and can all compare what you recall, maybe be refreshed? Would you -- do you feel that you could, with those assistances, be able to recall testimony that occurred maybe two, three weeks ago?” RP 734. Juror 26 stated, “I don’t think so.” No one, not the prosecutor, trial court, or defense counsel ever followed up with Juror 26 as to her clear statement that she could not remember the evidence presented, even if she took notes and discussed the case with other jurors. Nevertheless, Juror 26 was seated for Britt’s trial as Juror 3. CP 247, 249.³

3. Missing witness Regina Golden and the denial of defense evidence regarding Regina Golden that was intended to attack the credibility of prosecution witnesses

At the time of trial, J.B. and B.C. lived with Norman Golden, their step-grandfather, and Christine Kilpatrick, their great-grandmother. Norman

³ Contemporaneously with filing this brief, Britt designates the jury selection sheets and anticipates that the pertinent pages of the jury selection sheets will appear in the clerk’s papers at pages 247 and 249.

Golden's wife, Regina Golden, is the boys' maternal grandmother, whom Norman Golden, Christine Kilpatrick, J.B., and B.C. all claimed was out of state and had been for more than three months before trial. RP 953, 1001-01, 1128-29, 1248-49, 1369-70, 1378-79, 1453-54, 1474-78.

Before trial, the parties discussed Regina Golden's whereabouts and availability for a defense interview; the State indicated she had been unavailable. RP 9-10. The trial court later issued a material witness warrant to compel Regina Golden's attendance at trial. RP 155-56. Golden ultimately never testified, despite having some contact with the prosecutor. RP 1038-39.

Britt sought to discredit witnesses' accounts that Regina Golden was actually out of state and attempted to demonstrate she was actually living in the same home with J.B. and B.C. the whole time. During the cross examination of several witnesses, which will be discussed in more detail in the argument section below, the defense attempted to show elicited testimony that Regina Golden's 11-year-old daughter lived in the same house as J.B. and B.C., and that neither Norman Golden nor anyone else had parental rights or obligations as to this daughter, so it would be implausible that Regina Golden would have left her daughter with others for more than three months. RP 1386-87. However, the trial court refused to allow it and excluded evidence of Regina Golden's daughter's parentage, claiming it would confuse the issues at trial. RP 1389, 1391-92.

Along the same lines, Britt also attempted to elicit evidence that Regina Golden could not be a legal caretaker of Britt's children because she could not pass a background check with Child Protective Services. RP 1464. According to defense, this supplied a motive for the various witnesses to fabricate a story that Regina Golden was living out of state rather than in the home. The trial court did not see the relevance and ordered defense to either explain the relevancy or recall witnesses later at trial; defense counsel forwent the opportunity indicating he would tie up the relevancy at a later time. RP 1472.

Defense counsel revisited the issue during the testimony of social worker Shannon Woodard, asking her about background checks required for child placement. RP 1640-41. The court believed the evidence was too attenuated, questioning whether Regina Golden's living circumstances constituted a collateral matter that could not be used for impeachment. RP 1647-48. On the other hand, the trial court did seem to acknowledge the importance of the testimony to challenge the witnesses' credibility, which would always be relevant. RP 1643.

In addition, defense counsel presented a motion regarding the issue of witness bias and credibility as it pertained to Regina Golden, arguing why contradicting witness accounts that she was living outside Washington was essential to Britt's defense. CP 38-46.

Ultimately, the trial court rejected every defense attempt to attack the witnesses' credibility during cross examination with regard to Regina Golden's whereabouts during the State's case-in-chief.

During Britt's case, however, the defense investigator testified she made contact with Regina Golden at the residence where J.B. and B.C. lived, noting she went to the residence, knocked on the door, asked the woman who answered whether she was Regina Golden, and handed over paperwork when the woman answered yes. RP 1884-86, 1913. The investigator also recognized Regina Golden from a Facebook photo. RP 1882, 1913.

4. The State's elicitation of evidence that numerous jail phone recordings had been redacted and would not be shared with the jury

The prosecution and defense agreed to present limited portions of Britt's jail call recordings. RP 1438-41, 1479. When the State presented the jail calls, however, it elicited the total length of the call recordings, noting that there were numerous calls and several hours of recordings. RP 1557, 1559-60. Britt objected to the length of the jail calls on relevancy grounds and ER 403. RP 1561. The State responded, in front of the jury, "it's a way of getting at the fact that these will be redacted, not presented in their entirety and explaining why that is." RP 1561. The court sustained Britt's objection. RP 1561.

The trial court brought the State's explanation up later indicating that while it was appropriate to make a record of which portions of the recordings were redacted, "to the extent that evidence has been redacted, I think it's appropriate to make a record of it outside the presence of the jury, and that's why that objection was sustained" RP 1584.

5. Verdicts, judgment, sentence, and appeal

The jury returned guilty verdicts on one count of child assault in the first degree, two counts of child assault in the second degree, and two counts of communication with a minor for immoral purposes. CP 157, 161 164-65, 168. The jury acquitted Britt of first degree child molestation and sexual exploitation of a minor. CP 170, 172.

The trial court imposed a sentence of 171 months for the first degree assault of a child conviction, two 68-month concurrent sentences for each of the second degree assault of a child convictions, and two concurrent, suspended 364-day sentences for each of the communication with a minor for immoral purposes convictions. CP 215, 232. The trial court also imposed a \$100 DNA database fee and a \$200 criminal filing fee. CP 213. Britt was found to continue to qualify as indigent and appeals. CP 239.

C. ARGUMENT

1. COGNITIVE INABILITY TO SERVE AS A JUROR EXPRESSED BY A JUROR SEATED FOR BRITT'S TRIAL VIOLATED BRITT'S JURY TRIAL RIGHT

During voir dire, Juror 26 expressed she was not capable of remembering the evidence presented over a lengthy, three-week trial. RP 734. Upon questioning by the prosecutor, Juror 26 clearly stated that neither notetaking nor deliberating with other jurors would assist her in overcoming her memory deficit. RP 734. No further discussion regarding Juror 26's memory issue occurred. See RP 706, 739, 768 (other instances where Juror 26 briefly spoke during voir dire). Juror 26 was seated for trial as Juror 3. RP 774; CP 247, 249.

“Criminal defendants have a federal and state constitutional right to a fair and impartial jury.” State v. Irby, 187 Wn. App. 183, 192-93, 347 P.3d 1103 (2015) (citing Taylor v. Louisiana, 419 U.S. 522, 526, 95 S. Ct. 692, 42 L. Ed. 2d 690 (1975); State v. Brett, 126 Wn.2d 136, 157, 892 P.2d 29 (1995); U.S. CONST. amend. VI; CONST. art. I, §§ 21, 22. Most cases that have addressed the jury trial right involve seating a biased juror, which “violates this right.” Irby, 187 Wn. App. at 193. “A trial judge has an independent obligation to protect that right, regardless of inaction by counsel or the defendant.” Id. (citing State v. Davis, 175 Wn.2d 287, 316, 290 P.3d 43 (2012); Hughes v. United States, 258 F.3d 453, 464 (6th Cir. 2001)).

Juror 26 did not express bias but nonetheless expressed an inability to serve as a functional, competent juror. Juror 26 was asked, “anyone here who says, you know what, even if I take notes, I’m not going to be able to retain this evidence over the course of three weeks? Anyone here feel that? It’s okay, we just need to know that.” RP 734. Juror 26 responded, “I’m not really good at taking notes and whatever I write down usual is not --” at which point the prosecutor interrupted and asked, “So what if you’re able to afterwards talk with other jurors and can all compare what you recall, maybe be refreshed? Would you -- do you feel that you could, with those assistances, be able to recall testimony that occurred may two, three weeks ago?” RP 734. Juror 26 stated, “I don’t think so.” Thus, Juror 26 was clear in that she could not remember the evidence presented over a lengthy three-week trial and that neither notetaking nor discussing the evidence with fellow jurors would assist her in remembering the evidence. Juror 26 was not competent to serve as a juror and she said as much.

RCW 2.36.110 governs the circumstances where the trial judge is required to excuse a person, like Juror 26, who is not fit for jury service. RCW 2.36.110 provides,

It shall be the duty of a judge to excuse from further jury service any juror, who in the opinion of the judge, has manifested unfitness as a juror by reason of bias, prejudice, indifference, *inattention of any physical or mental defect* or by

reason of conduct or practices *incompatible with proper and efficient jury service*.

(Emphasis added.) “RCW 2.36.110 . . . place[s] a continuous obligation of the trial court to excuse any juror who is unfit and unable to perform the duties of a juror.” State v. Jorden, 103 Wn. App. 221, 227, 11 P.3d 866 (2000). In light of Juror 26’s clear statements about impaired memory, the trial court failed in complying with the mandatory duty RCW 2.36.110 establishes.

Under the statute, Juror 26’s statements demonstrate she was unfit by reason of inattention or physical or mental defect that made her incompatible with proper and efficient jury service. She stated she could not remember the evidence presented over a three-week trial. In this case, the evidentiary portion of trial began on September 20, 2017 and ended on October 11, 2017 with a gap, recessing after September 28, 2018 and recommencing on October 11, 2017. RP 893, 1807-09. Because she stated she would be unable to recall the evidence presented at trial, she manifested unfitness by either inattention or by a physical or mental defect under RCW 2.36.110. Given this manifestation of unfitness, the trial court had the mandatory duty to excuse Juror 26, as is also stated in RCW 2.36.110. The trial court’s failure to comply with its duty under RCW 2.36.110 requires reversal.

Britt finds no case addressing a juror who, like Juror 26, expresses a mental incapacity to serve. Rather, cases such as Irby and this court’s more

recent decision in State v. Lawler, 194 Wn. App. 275, 374 P.3d 278, review denied, 186 Wn.2d 1020, 383 P.3d 1027 (2016), address questions of juror bias, not other issues of unfitness. They nevertheless provide some helpful guidance.

In Irby, the trial court erred in refusing to sua sponte dismiss a juror who stated during voir dire that she was more inclined toward the prosecution and “would like to say [the defendant]’s guilty.” 187 Wn. App. at 190. There was no follow up to this excuse and this juror was seated on the jury. Id. The Court of Appeals reversed noting that the statement, “I would like to say he’s guilty” was an unqualified statement that demonstrated actual bias, the inability to be fair. Id. at 196. “When a juror makes an unqualified statement expressing actual bias, seating the juror is a manifest constitutional error.” Id. at 188.

In Lawler, this court distinguished Irby, noting that the juror at issue in Lawler had merely expressed uncertainty about whether he could be objective, “not that he had a firm conviction of that fact. His answers seemed to convey a vague, nonspecific discomfort with the case rather than a firm bias.” Lawler, 194 Wn. App. at 287. The juror also stated it would be a “pain in the neck” to sit on the jury, which “seem[ed] to refer to inconvenience rather than bias.” Id. Thus, this court was unconvinced that the juror’s statements

were “unqualified statement[s] expressing actual bias,” as in Irby. Lawler, 194 Wn. App. at 287 (quoting Irby, 187 Wn. App. at 188).

Juror 26’s statements in this case are more like those in Irby. They are unqualified statements expressing actual unfitness for jury service. As noted, Juror 26 said she could not remember evidence presented over a three-week trial. She maintained this answer despite the possibility for notetaking and despite the fact that she would be able to talk to other jurors about the evidence during deliberations. Her statements about faulty memory were unqualified in their expression of either inattention or physical or mental defect.

The Lawler court also pointed out that both the trial court and defense counsel were “alert to the possibility of biased jurors” and abdicated their responsibility to evaluate the jurors. Lawler, 194 Wn. App. at 287-88. The court also indicated that defense had a peremptory challenge available but elected not to use it to challenge the potentially biased juror, “lead[ing] to a presumption that Lawler wanted juror 23 on the jury.” Id. at 288. And the court indicated it must be careful not to interfere with a defendant’s strategic decisions in maintaining jurors even despite expressing some equivocal bias. Id. at 288-89.

These additional considerations do not apply where the issue is not bias but mental unfitness. In Britt’s case, the court, the State, and defense counsel were all alert to the possibility of biased jurors, excusing several on

that basis. See, e.g., RP 281-83, 388-94, 532-36, 642-43. But being alert to bias is not the same as being alert to mental incompetence or unfitness, which is what Juror 26 expressed. In addition, defense used all its peremptory challenges on jurors other than Juror 26. RP 774-77. Thus, unlike Lawler, no presumption arises that Britt necessarily wanted Juror 26 on her jury. And, it is hard to fathom that any valid strategy would consist of placing a juror mentally incapable of jury service on the jury. Lawler merely underscores differences between assessing juror bias and juror incapacity and therefore does not control.

Britt's right to a jury trial was violated when the trial court failed in its duty to excuse a juror from further service who manifested unfitness to serve based on her poor memory. This error requires reversal and retrial.

2. THE TRIAL COURT'S PLACEMENT OF LIMITATIONS ON BRITT'S CROSS EXAMINATION OF SEVERAL WITNESSES REGARDING THE WHEREABOUTS OF SUBPOENAED MATERIAL WITNESS REGINA GOLDEN DEPRIVED BRITT OF HER CONSTITUTIONAL RIGHT TO ADVANCE HER DEFENSE BY CHALLENGING THE CREDIBILITY OF THE STATE'S WITNESSES

Throughout trial, the defense attempted to demonstrate that a material witness, Britt's mother Regina Golden, was not out-of-state like the State's witnesses claimed, but was in fact living with Britt's children and other witnesses, and simply refused to come to court. The evidence of Golden's

whereabouts was necessary to support the defense theory that the State's witnesses, and particularly Britt's children and her children's current caregivers, were lying about Golden's whereabouts and therefore were not credible with respect to their claims against Britt. Although Britt during her case-in-chief was eventually able to introduce evidence that Golden was not out-of-state but living in the same house as Britt's children, she was denied the opportunity develop this evidence during the State's case-in-chief. This rendered her trial unfair and requires reversal.

The Sixth Amendment provides, "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him . . . and to have the Assistance of Counsel for his defense." Article I, section 22 similarly guarantees the right of a criminal defendant "to meet the witnesses against him face to face" The "rights to confront and cross-examine witnesses . . . have long been recognized as essential to due process." Chambers v. Mississippi, 410 U.S. 284, 294, 93 S. Ct. 1038, 35 L. Ed. 2d 297 (1973); accord State v. Parris, 98 Wn.2d 140, 144, 654 P.2d 77 (1983) ("The main and essential purpose of confrontation is to secure for the opponent the opportunity of cross-examination. The purpose of such confrontation is to test the perception, memory and credibility of witnesses." (citations omitted)). "Cross-examination is the principle means by which the believability of a witness and the truth of his testimony are tested [T]he cross-examiner is

not only permitted to delve into the witness' story to test the witness' perceptions and memory, but the cross-examiner has traditionally been allowed to impeach, i.e., discredit, the witness." Davis v. Alaska, 415 U.S. 308, 316, 94 S. Ct. 105, 39 L. Ed. 2d 347 (1974). "The partiality of a witness is subject to exploration at trial, and is 'always relevant as discrediting the witness and affecting the weight of his testimony.'" Id. (quoting 3A J. WIGMORE, EVIDENCE § 940, at 775 (Chadborun rev. 1970)). Thus, when a court erects barriers that deny full cross examination to develop defense evidence, it results in a violation of a defendant's constitutional confrontation rights and a fair trial. That is what happened in Britt's trial with respect to the important credibility issue of where Regina Golden was and why she was not present for trial.

Prior to trial, the parties discussed where Regina Golden was and why she had not appeared for trial. At the very beginning of trial, the State raised Golden's unavailability to date for a defense interview, and the parties also discussed the possibility that the court might need to issue a material witness warrant to compel Golden's attendance. RP 9-11. The trial court later issued a material witness warrant to compel Golden's attendance at trial. RP 155-56. And, although the prosecutor had some contact with Golden during the trial, Golden ultimately never testified. RP 1038-39.

Several witnesses testified that Golden was not present because she was living out of state and had been outside Washington in the weeks or months leading up to the trial. RP 953, 1000-01 (detective indicating the information he had was that Golden was living out of the state); RP 1128-29 (J.B. testifying that Golden “went out of state” “more than two weeks ago” and that he did not know where she was or why she was there); RP 1248-49 (B.C. testifying that Golden used to live with him but she now was “out of state”); RP 1369-70, 1378-79 (Golden’s mother, Christine Kilpatrick, who lived with and took care of Britt’s children, indicating that she had not seen Golden in two to three months); RP 1453-54, 1474-78 (Golden’s husband, Norman Golden, indicating he last saw Golden three months ago and that she was currently in Virginia working a bookkeeping job).

However, this testimony regarding Golden’s whereabouts was contradicted in Britt’s case-in-chief. Defense investigator Julie Armijo testified that on September 8, 2017, she made contact with Golden at the residence where Britt’s children lived, noting she went to the residence, knocked on the door, asked the woman who answered whether she was Regina Golden, and handed over paperwork when the woman answered yes. RP 1884-86, 1913. Armijo also recognized Golden from a Facebook photo. RP 1882, 1913.

Although Britt was ultimately able to contradict the account of the State's witnesses as to Golden's being "out of state" through her own witness, she was prohibited from supporting this attack on the credibility of the State's witnesses during cross examination on at least four occasions. This unnecessary and erroneous restriction on Britt's ability to lay the foundation to challenge the credibility of the State's witnesses, essential to Britt's defense, deprived Britt of a fair trial.

The first unwarranted restriction occurred during the presentation of the State's first witness, Detective William Muse. Muse indicated that he had been in contact with Golden via text message, and Golden had stated she was out of state. RP 1000-01. When defense counsel asked whether Golden indicated "when she might be returning to the state," the State objected based on hearsay and relevance. RP 1001. Defense counsel responded that it was not hearsay because the testimony was not being offered for the truth of the matter asserted and that the evidence was relevant to show bias. RP 1001. The court overruled the State's hearsay objection but sustained the objection "as to relevance, if there's some indication of bias that would be used to impeach any testimony or any out-of-court statements made by Ms. Golden, but there's been no out-of-court statements admitted for the truth of the matter asserted so there's nothing to impeach." RP 1001-02. The court indicated that

defense could reexamine the issue in the event Golden showed for trial. RP 1002.

From this, it appears that the court did not yet fully understand how Golden's absence went to the bias of the state's witnesses. The trial court seemed to believe that Golden's plans to return to the state had no relevance except to impeach Golden's out-of-court statements. RP 1002. As the trial drew on, however, it became clear that this was not the bias defense counsel was talking about.

The second instance of unfair restriction elucidated the issue. During the testimony of Golden's mother, Christine Kilpatrick, defense counsel elicited testimony that Golden had a 11-year-old daughter, A., but that A. was not Norman Golden's child. RP 1376-78. Defense counsel also elicited testimony that Kilpatrick had not seen Regina Golden in three months, yet A. still lived with Kilpatrick and Norman Golden, and Kilpatrick was A.'s primary caregiver. RP 1378-79, 1384. Defense counsel also elicited Kilpatrick's testimony that Golden could not be a legal caretaker for Britt's children because Child Protective Services had disallowed it. RP 1380-81. The State objected to evidence of A.'s parentage, claiming it was not relevant and asking that it be stricken. RP 1382.

Defense counsel asserted that

[A.] is not the daughter of Norman Golden. That is a fact that we are already very well aware of. The issue is that because we don't believe it is necessarily . . . there's a bias inherent in them not wanting to say that Ms. Golden has been here the entire time, okay, and that they are intentionally trying to promulgate that. We don't believe that it is logical or truthful that Ms. Golden has somehow left her daughter with the stepfather and has completely abandoned the home and is no longer parenting her own daughter simply because of some CPS order in regards to the other three children, and so we are trying to establish that Mr. Golden is not, in fact, the parent of [A.], has no parental rights with [A.], has no ability to sign any sort of emergency paperwork or anything else that may come about, and . . . so we are trying to establish that link, and that's what Defense was doing.

RP 1386-87. The State asserted there was an insufficient nexus to show relevancy, especially given that "they have someone they can call to say I saw her [Regina Golden] physically in the state." RP 1388. The court understood the defense position: "I think [the] point is not so much that she's in state or out of state, but rather that this witness is aiding or facilitating or directly attempting to secrete the witness, and . . . I think one can articulate relevance."

RP 1389. However, the court nonetheless sustained the objection:

it's more in the realm of confusion of the issues . . . I think it's a bit far removed. I think the standard for relevant evidence is met, and it is technically relevant. Again, I think it's just far enough removed to where it leads to confusion of the issues, and so I'll sustain the objection as to that.

RP 1389. The court later clarified,

I'm not ruling upon whether it's appropriate to point out or argue in closing argument or continue to bring out evidence of Ms. Kilpatrick possibly secreting Regina Golden. My ruling is based on a separate issue; it's just confusion of issues. I'm

not saying that it would be admissible, but I also want to be clear that at this point, I'm not precluding the attorneys from exploring that either.

RP 1391. Thereafter, the court instructed the jury to disregard all the questions pertaining to A.'s parentage. RP 1392.

The trial court's ruling was incorrect. At this point in trial, numerous witnesses, including Kilpatrick and both of Britt's sons, had indicated that Regina Golden was out of state. Establishing that it was improbable that Regina Golden simply would have left her 11-year-old daughter with her husband and mother for three months was important for demonstrating that Kilpatrick and Britt's children were not being forthright as to Regina Golden's true whereabouts. The trial court recognized the obvious relevance to the defense in challenging these adverse witnesses' credibility. Yet it nonetheless kept evidence of A.'s parentage from the jury based on the supposed confusion it would cause. Ironically, the trial court stated it was not precluding Britt from "exploring" the possibility that the witnesses were secreting (and therefore lying about) the location of Regina Golden, when the trial court in fact precluded this precise "exploring" by rejecting evidence of A.'s parentage. Britt was thereby denied her right to fully cross-examine witnesses and challenge the credibility of the State's evidence. Her trial was unfair.

Unfortunately, however, rather than allowing the defense to explore credibility through demonstrating Regina Golden was not actually out of state,

the trial court persisted in excluding relevant evidence regarding Regina Golden's whereabouts for a third time. During the testimony of Norman Golden, Regina Golden's husband, defense counsel attempted to elicit testimony that Regina Golden could not be a legal caretaker of Britt's children because she cannot pass a background check with Child Protective Services. RP 1464. The State objected on the basis of speculation and hearsay. RP 1464-66. Defense counsel responded that the testimony was neither speculative nor hearsay, because the question pertained solely to whether Norman Golden actually knew whether his wife was allowed to be a legal caretaker of Britt's children. RP 1466. Defense counsel also argued that the evidence was not offered for the truth but for "background information and for bias. We anticipate that at some point, Ms. Golden is going to be testifying and/or it could go to the bias of this witness and other witnesses that have already testified." RP 1468-69.

The trial court indicated it was unclear how the evidence was relevant to show bias, despite having heard a very similar argument as to A.'s parentage the day before. RP 1471. The trial court posed two options for the defense: either articulate exactly how the evidence would be relevant or not disclose trial strategy subject to recall of the witness later in trial. RP 1471-72. At that, defense counsel withdrew the question, indicating he would tie up the relevancy at a later time. RP 1472.

The trial court thus essentially forced defense to move on from presenting evidence necessary to establish the bias or dishonesty of the State's witnesses. As was clarified during the discussion of A.'s parentage, the defense sought to admit evidence that Regina Golden was not really outside Washington as several witnesses claimed but was living in the house with Britt's children. The fact that Regina Golden was not permitted to be a caregiver for Britt's children based on a prior issue with Child Protective Services established at least a potential motive to fabricate testimony as to Regina Golden's true whereabouts. Because it provided an explanation for why the State's witnesses were lying as to this point—and therefore not credible overall—evidence of Golden's prior founded CPS complaint was highly relevant to attack the credibility of the State's witnesses. Britt was denied this opportunity to undermine the State's evidence, depriving her of a fair trial.

The denial of similar defense evidence occurred a fourth and final time during the testimony of social worker Shannon Woodard. Defense counsel began to ask Woodard about the process of relative background checks required for longer term placement of children. RP 1640-41. The State objected to relevancy and defense counsel indicated, "it comes up partly about this witness that we don't have before us, Your Honor," referring again to Regina Golden. RP 1641.

After the court excused the jury, defense counsel iterated that the court had heard the argument before, but that he was specifically attempting to elicit that Regina Golden refused to take a CPS background check. RP 1641-42.

The court articulated the defense position:

So all of this, I think, gets around to . . . the basic point that she's living a lie for lack of a better way to put it, this dishonest conduct of representing that she's not living at the house because she's not approved to live at the house with the kids that are placed there by CPS but, in fact, she's actually living there and no one wants to acknowledge it or admit it.

RP 1643. Defense counsel confirmed this understanding and stated, "we believe it is evidence suggesting towards Mr. Norman [Golden], for example, would testify that she wasn't and hasn't been [living in the house] for a long time. So it goes towards impeachment of those witnesses also." RP 1643. The court clarified and defense counsel confirmed that there was no relevance at this point "beyond . . . pointing out some level of dishonesty by Regina Golden and by any other witness who, up to this point, has testified that she's no longer living there and hasn't been for some time." RP 1643-44.

The court then confounded the issue, stating, "to the extent that the ultimate point is an inference that she's [Regina Golden] coached the children, it really is inference heaped upon inference heaped upon inference, and it just becomes so remote, so attenuated as to become excludable under [ER] 403, and the Court would exclude it under 403." RP 1645-46. The court also

questioned whether Regina Golden's living circumstances constituted a collateral matter that could not be impeached versus a true issue of bias. RP 1647-48. At this, defense counsel again indicated that the issue of bias did not need to be followed up with this witness specifically, but noted, "we're probably going to have a long argument about" the issue of bias "at some point." RP 1647-48. The court indicated that the State's objection would be sustained as it related to Woodard's testimony. RP 1648.

Again the trial court erred in restricting defense counsel's cross examination. The issue was not that Regina Golden coached the children, as the trial court suggested. Rather, the issue was pointing out other witnesses' dishonesty with respect to Regina Golden's living situation, which tended to undermine these witnesses' credibility overall. Nor was the trial court's discussion of impeachment on a collateral matter and prior inconsistent statements on point. RP 1646. As the trial court correctly stated, "To the extent that it goes to bias and you can articulate why it's an issue of bias, that brings us into a different analysis. I mean, similar analysis but bias is just not considered collateral." RP 1647. Given that the trial court clearly understood the relevance of the testimony—attacking the credibility of witnesses—it was error for the trial court nonetheless to again create an obstacle to the admission of the relevant evidence during Woodard's testimony. This additional error deprived Britt an opportunity to effectively cross-examine witnesses, an

opportunity to establish witnesses' motive to fabricate Regina Golden's living situation, and, ultimately, an opportunity to present a defense by challenging the credibility of the State's evidence.

Although the defense was ultimately able to elicit evidence through its own witness that Regina Golden was present and living at the same home with the children, Britt was denied the opportunity to elicit other evidence to support this theory during the State's case-in-chief. Evidence that Regina Golden had left her 11-year-old daughter for more than three months to work a bookkeeping job in Virginia coupled with evidence that Regina Golden refused to undergo a CPS background check and would not have passed anyway gives rise to a reasonable claim of dishonesty on the part of the State's several witnesses—William Muse, Christine Kilpatrick, Norman Golden, J.B., and B.C.—who claimed that Regina Golden was outside the state. The trial court erred in denying this evidence on the basis that it was either not relevant or too confusing for the jury.

The denial of this evidence prohibited Britt from pursuing her constitutional right to an adequate defense. Constitutional errors require reversal unless the prosecution can prove beyond a reasonable doubt that a jury would reach the same verdict absent the error and where the untainted evidence is so overwhelming that it necessarily leads to a finding of guilt. State v. Easter, 130 Wn.2d 228, 242, 922 P.2d 1295 (1996). The State cannot

make this showing. This case largely hinged on the credibility of Britt's sons in their claims of abuse. As the State's closing PowerPoint presentation made clear, its theory of culpability was (1) someone coached J.B. and B.C. to bring false claims; (2) J.B. and B.C. made their claims up; or (3) J.B. and B.C. were truthful. RP 2055-57. The State devoted a significant amount of time in closing argument discussing J.B.'s and B.C.'s credibility and pleading with the jury to believe them. RP 2101-04, 2106-18. And there was already evidence introduced at trial that B.C. was not truthful and had a reputation for untruthfulness. RP 1935, 1965-66. As such, evidence indicating that the State's witnesses were untruthful with respect to Regina Golden's whereabouts went to a central issue at trial—witness credibility. As such, the trial court's errors in excluding evidence supportive of Britt's theory of credibility was not harmless. Britt's convictions should be reversed.

3. THE COURT ERRED IN ADMITTING EVIDENCE THAT
PITTED THE DISCIPLINARY ACTIONS OF B.C.'S
AUNT AND TEMPORARY CAREGIVER AGAINST
BRITT'S DISCIPLINARY ACTIONS

Over Britt's relevance objection, the State introduced evidence that B.C.'s aunt never wanted to hit B.C. when she took care of him despite him being frustrating. RP 1366-67. This evidence was not relevant, as it does not make it more or less likely that Britt committed any element of assault or more or less likely Britt was imposing lawful physical discipline. The evidence was

prejudicial because it unfairly pitted the actions of another of B.C.'s caregivers against Britt's actions, undermining her lawful physical discipline defense. Accordingly, Britt's assault convictions against B.C. should be reversed.

“‘Relevant evidence’ means evidence having any tendency to make the existence of a fact that is of consequence to the determination of the action more probable or less probable that it would be without the evidence.” ER 401; State v. Weaville, 162 Wn. App. 801, 818, 256 P.3d 426 (2011). All relevant evidence is admissible whereas “[e]vidence which is not relevant is not admissible.” ER 402.

Linda Rogers, B.C.'s aunt, testified she never hit B.C. RP 1366. Then the State asked, “Did you ever become so frustrated . . . in dealing with him that there was some small part of you that wanted to?” RP 1366. Defense counsel objected based on relevance; the court asked to hear the question again and then overruled the objection. RP 1366. Rogers then stated she never wanted to hit B.C. despite agreeing that B.C. was frustrating. RP 1367.

Whether Rogers wanted to hit B.C. or not hit B.C. was not relevant in any way. It did not tend to make it more or less likely that Britt hit or inappropriately disciplined B.C. It did not tend to make it more or less likely that Britt's discipline of B.C. was reasonable or unreasonable. Whether Rogers wanted to hit B.C. out of frustration was simply not relevant to any element of child assault or reasonable physical discipline the State had to

prove. Because Rogers's testimony on this point was not relevant, it was not admissible.

The admission of this evidence was prejudicial. It permitted the State to pit Linda Rogers's disciplinary actions against B.C. against Britt's. Even though Rogers agreed that B.C. was a frustrating child to deal with and discipline, she did not physically discipline him. This lack of physical discipline despite frustration allowed the State to undermine Britt's defense that her physical discipline of B.C. was reasonable and moderate, and therefore lawful. The lawfulness of Britt's physical discipline was Britt's sole defense and therefore a central issue at trial. Because Rogers's irrelevant testimony as to her lack of desire to physically discipline B.C. undermined the sole defense, it effects the outcome of trial within and reasonable probability. Britt's convictions of first and second degree child assault against B.C. should be reversed.

4. THE PROSECUTOR'S INTRODUCTION OF EXCLUDED EVIDENCE—THE LENGTH OF REDACTED JAIL PHONE RECORDINGS—WAS MISCONDUCT INTENDED TO PORTRAY BRITT AND HER LEGAL TEAM AS HIDING EVIDENCE FROM THE JURY, THEREBY DERPVIED HER OF A FAIR TRIAL

Prosecutors are officers of the court and have a duty to ensure that the defendant 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). Where prosecutorial misconduct affects the jury's verdict, the misconduct violates the accused's rights to a fair trial and to an impartial jury. State v. Reed, 102 Wn.2d 140, 145, 684 P.2d 699 (1984).

“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). When a prosecutor violates an in limine ruling, it constitutes flagrant and prejudicial misconduct. State v. Smith, 189 Wash. 422, 428-29, 65 P.2d 1075 (1937); State v. Stith, 71 Wn. App. 14, 22-23, 856 P.2d 415 (1993).

In Smith, the trial court granted the defense motion in limine to prohibit the prosecutor from asking Smith about his dishonorable discharge from military service because of its prejudicial impact. 189 Wash. at 428. The prosecutor asked Smith about his discharge anyway. Id. at 428-29. The court held that the prosecutor's actions were “highly prejudicial” and, “in view of the deliberate disregard by counsel of the court's ruling, prejudice must be presumed.” Id. at 428-29. Thus, a new trial was required. Id. at 429.

In Stith, the trial court excluded evidence of Stith's prior drug convictions, but the prosecutor argued that Stith was “just coming back and he was dealing again.” 71 Wn. App. at 21-22. Defense counsel objected and the trial court gave a curative instruction. Id. at 22. The Court of Appeals

nonetheless concluded the misconduct could not be cured, remanding for a new trial. Id. at 22-23.

In Britt's case, the parties reached an agreement as to which portions of Britt's jail call recordings would be admitted into evidence, discussing the issue a few times before the State presented the jail calls. See RP 1438-41, 1479. The parties reached an agreement as to which portions of the jail calls would be presented and which portions would be redacted. RP 1479.

The State presented the redacted jail recordings through Pierce County sheriff's deputy Torveld Pearson, who served as the jail's liaison with Securus Tech, the inmate phone service provider. RP 1545. As the State was presenting testimony about the jail calls, it elicited the total length of the jail call recordings. For instance, with respect to Exhibit 40, a disk containing calls between July 25, 2016 and January 27, 2017, the State introduced evidence that the disk contained more than 60 hours of recordings. RP 1557. With respect to Exhibit 41, another disk containing calls between February 1 and June 20, 2017, the State elicited testimony that there were 300 calls recorded amounting to 3,048 minutes of recording. RP 1559-60. When the State asked Pearson to convert minutes into hours, defense counsel lodged an objection based on ER 401, ER 402, and ER 403. RP 1560. The court overruled this objection. RP 1560.

The State again asked about the total length in hours of the recordings contained on Exhibit 42, which contained calls recorded between June 21 and September 25, 2017. RP 1561. Defense objected on the same basis, relevancy and ER 403, and the court inquired as to relevance. RP 1561. The State responded, “by way of offer of proof, I intend to -- it’s a way of getting at the fact that these will be redacted, not presented in their entirety and explaining why that is.” RP 1561. The court this time sustained the objection. RP 1561.

When the matter was discussed later, the court noted that simple conversion of minutes to hours did not seem inappropriate. RP 1584. However, the court noted that while it was appropriate to make a record of which portions of the recordings were redacted, “to the extent that evidence has been redacted, I think it’s appropriate to make a record of it outside the presence of the jury, and that’s why that objection was sustained” RP 1584.

It was misconduct for the State to elicit testimony that the recordings had been redacted. The whole purpose of redacting evidence is so that it is not presented to the jury. Yet, in front of the jury, the State elicited testimony of the total length of jail calls so that the jury would have information that pieces of evidence had been redacted and would not be “presented in their entirety.” RP 1561. The jury had no business learning that evidence was redacted. By alerting the jury to the fact of redactions, the prosecutor made it

appear that Britt and her legal team were intentionally hiding or obscuring evidence. This was misconduct.

The situation is akin to what occurred in State v. Wallin, 166 Wn. App. 364, 269 P.3d 1072 (2012), which involved a prosecutorial accusation that the defendant tailored his testimony based on the evidence presented throughout his trial. The Wallin court discussed the general rule under State v. Martin, 171 Wn.2d 521, 537-38, 252 P.3d 872 (2011): where a defendant opens the door during his or her testimony by mentioning the testimony of prior witnesses, the prosecutor does not violate article I, section 22 of the Washington Constitution by asking the defendant if “he had tailored his testimony to conform to testimony given by other witnesses.” Wallin, 166 Wn. App. at 367-72 (discussing Martin at length). However, in Wallin the defendant “did not ‘open the door’ to such cross-examination. He did not testify that he had based any of his answers on what he learned from the evidence. Nor was that a fair inference.” Wallin, 166 Wn. App. at 372. The court concluded that “cross-examination that generically suggest to the jury tailoring, rather than a specific showing of tailoring, abridges a defendant’s rights to be present at trial and testify.” Id. at 376. Because “there is no showing that Mr. Wallin had any opportunity to ‘tailor’ his testimony other than showing up for trial,” the court reversed and remanded for a new trial. Id. at 377.

Although the issue in Britt's trial was not tailoring testimony, it nonetheless consisted of tailoring the evidence that would be presented to the jury—the redaction of jail calls. The parties had reached an agreement regarding how the jail calls would be redacted. The State's elicitation of evidence that the jail calls were redacted, however, needlessly suggested that the evidence had been tailored. Because the State was presenting the evidence of redaction or tailoring, Britt and her lawyers appeared as the driving force behind this tailoring. Britt had not opened the door to the State's suggestion of tailoring; Britt's counsel reached an agreement with the State about redactions and expected the State to honor that agreement, not mention the fact of redaction to the jury. RP 1560-61 (objecting to State's elicitation of entire length of jail calls). As in Wallin, it was unfair to state that evidence had been redacted because that made it appear that Britt had improperly insisted on narrowing the scope of the evidence the jury could consider, which in turn served to punish her for exercising her right to counsel and to trial. The State's introduction of the fact that jail calls had been redacted was improper and constituted misconduct.

The State is not permitted to rely on evidence that is not admitted at trial. In State v. Jones, 144 Wn. App. 284, 295-97, 183 P.3d 307 (2008), for example, the State speculated about various reasons that a confidential informant did not testify, none of which were supported by the evidence. This

constituted misconduct. Id. at 297. In State v. Pierce, 169 Wn. App. 533, 553, 280 P.3d 1158 (2012), the prosecutor created a fictitious first-person narrative of Pierce's thought process in committing the crimes and fabricated a description of how the murders occurred, which was not supported by evidence adduced at trial. This court reversed given the likelihood that the prosecutor's comments had a substantial likelihood of affecting the verdict. Id. at 556. These cases stand for the proposition that the State is not permitted to encourage extraevidentiary speculation on the part of the jury.

By introducing the fact of redaction, the State here similarly invited the jury to speculate regarding the contents of the jail calls. This misconduct was prejudicial. Britt objected to the State's elicitation of testimony regarding redaction of the jail calls. The fact of redaction made it seem Britt and her lawyers intended to hide damaging evidence. It suggested there was significant additional inculpatory evidence that further implicated Britt in the crimes, but, because Britt and her lawyers insisted on redaction, this additional evidence would not be presented. No other explanation conceivably exists for the introduction of testimony that hours of jail calls would not be shared with the factfinder. And the State's suggestion was inflammatory, implying that the jury was not going to receive a full picture of the evidence against Britt because the jail calls were redacted at her request. Because the misconduct had a substantial likelihood of prejudicing the jury, reversal is required.

5. INEFFECTIVE ASSISTANCE RESULTING FROM COUNSEL'S FAILURE TO OBJECT TO EVIDENCE INADMISSIBLE UNDER THE CHILD HEARSAY STATUTE REQUIRES REVERSAL OF THE COMMUNICATION WITH A MINOR FOR IMMORAL PURPOSES AS TO BRITT'S YOUNGER SON, B.C.

The sole cogent evidence that Britt communicated with B.C. for an immoral purpose came from Exhibits 43 and 47, B.C.'s redacted forensic interviews. However, several of the statements in the forensic interviews did not pertain to sexual contact with B.C. or to physical abuse that resulted in substantial bodily harm; thus, several of the statements were inadmissible under RCW 9A.44.120, the child hearsay statute. Because of counsel's deficient failure to object to this inadmissible evidence, the communication with a minor for an immoral purpose conviction as to B.C. must be reversed.

The Sixth Amendment and article I, section 22 guarantee effective assistance of counsel. State v. Estes, 188 Wn.2d 450, 457, 395 P.3d 1045 (2017). "Washington has adopted . . . the two-pronged test [under Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)] for evaluating whether a defendant had constitutionally sufficient representation." Estes, 188 Wn.2d at 457. "Under Strickland, the defendant must show both (1) deficient performance and (2) resulting prejudice to prevail on an effective assistance claim." Estes, 188 Wn.2d at 457-58.

Performance is deficient if it “falls ‘below an objective standard of reasonableness based on consideration of all the circumstances.’” Id. at 458 (quoting State v. McFarland, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995)). “Prejudice exists if there is a reasonable probability that ‘but for counsel’s deficient performance, the outcome of the proceedings would have been different.’” Id. (quoting State v. Kyлло, 166 Wn.2d 856, 862, 215 P.3d 177 (2009)). A reasonable probability is lower than the preponderance standard; “it is a probability sufficient to undermine confidence in the outcome.” Id.

a. Counsel’s performance was deficient

“The duty to provide effective assistance includes the duty to research relevant statutes.” Id. at 460 (citing In re Pers. Restraint of Yung-Cheng Tsai, 183 Wn.2d 91, 102, 351 P.3d 188 (2015)). “Failing to conduct research falls below an objective standard of reasonableness where the matter is at the heart of the case.” Id. (citing State v. Kyлло, 166 Wn.2d 856, 868, 215 P.3d 177 (2009)).

In Estes, “defense counsel’s failure to investigate the impact of deadly weapon enhancements under the [Persistent Offender Accountability Act (POAA), RCW 9.94A.570] was objectively unreasonable.” Id. Defense counsel repeatedly acquiesced to the knives at issue as “deadly weapons”—thereby acquiescing to his client’s third strike offense—and “argued against the enhancements posttrial only after he became aware of his mistake.” Id.

Because he was unaware of an essential point of law, his performance was objectively unreasonable and Strickland, first prong was satisfied. Id. at 460-63.

Likewise, counsel was deficient for failing to investigate her client's Kentucky conviction before recommending a trial "even though the information given to her by the State indicated that the Kentucky conviction qualified as an 'adult felony' conviction." State v. Crawford, 159 Wn.2d 86, 99, 147 P.3d 1288 (2006). Crawford was facing lifetime incarceration under the POAA, yet counsel merely assumed the Kentucky conviction was a misdemeanor, non-strike offense. Id. at 92-93. The court concluded, "A reasonable attorney who knew of her client's extensive criminal record and out-of-state conviction would have investigated prior to recommending trial as the best option." Id. at 99.

The same failure occurred here in the form of failing to investigate and research the child hearsay statute and object to evidence falling outside the statute. Per RCW 9A.44.120, the only child hearsay statements that are admissible are those statements

describing any act of sexual contact performed with or on the child by another, describing any attempted act of sexual contact with or on the child by another, or describing any act of physical abuse of the child by another that results in substantial bodily harm as defined by RCW 9A.04.110

“Sexual contact” means “any touching of the sexual or other intimate parts of a person done for the purpose of gratifying sexual desire of either party or a third party.” RCW 9A.44.010(2). “Substantial bodily harm” means “bodily injury which involves a temporary but substantial disfigurement, or which causes a temporary but substantial loss or impairment of the function of any bodily part or organ, or which causes a fracture of any bodily part.” RCW 9A.04.110(4)(b).

In B.C.’s first forensic interview contained in Exhibit 43, B.C. stated his mother showed him pictures of “nasty stuff,” including pictures of her “private spot” and her “sucking someone else’s private.” Ex. 43 at 8:58–9:35.⁴ B.C. also stated in the interview that Britt had shown him pictures of her with someone else’s “dick,” which, according to B.C. was “just nasty.” Ex. 43 at 21:07–22:14. In the same interview, B.C. also stated Britt had whooped him all over his body with a TV wire, including his “private spot,” which he described as the place he goes “number one.” Ex. 43 at 17:40–18:54.

In Exhibit 47, B.C.’s second forensic interview, B.C. again described Britt whooping him all over his body with a wire, including his private parts. Ex. 47 at 13:06–13:24. B.C. also stated that Britt had “spray[ed] stuff” on his

⁴ Exhibit 43 is 42 minutes, 49 seconds long. The minute:second citations Britt provides refer to the minute and seconds of the video per its overall length, not the timestamp contained in the video itself. Britt uses the same minute:second citation form to reference Exhibit 47 as well.

private part which he stated caused a dark yellow discharge from his private part when he went to the bathroom. Ex. 47 at 14:38–16:34. B.C. later stated that Britt sprayed his private part to make it better, suggesting an unrelated injury. Ex. 47 at 17:26–18:26. Aside from the spraying, B.C. stated that no one had done anything else to his private part. Ex. 47 at 19:11.

These various statements contained in Exhibits 43 and 47 were not admissible as child hearsay because the statements neither involve any sexual contact with B.C. nor physical abuse resulting in substantial bodily harm. Showing a child pictures of nudity or sex acts plainly does not meet the definition of sexual contact, which requires actually physical touching (or an attempt to do so) of the child's or another's sexual or intimate body parts. RCW 9A.44.010(2). Because B.C.'s statements that Britt showed him sexually explicit photos does not amount to sexual contact with B.C., B.C.'s statements fall well outside the purview of what is admissible as child hearsay under RCW 9A.44.120.

The same is true regarding B.C.'s statements that Britt whipped his penis with a wire. First, although the act of whipping B.C.'s penis is contact with B.C.'s sex organ, there is no evidence to suggest that the purpose of the whipping was gratifying sexual desire. In the forensic interview, B.C. discussed being whipped all of his body, including his penis, suggesting that the purpose of the whipping was not sexual gratification but punishment or

discipline. A similar analysis would apply to spraying B.C.'s penis— according to B.C.'s own statements, Britt was spraying his penis in an attempt to make it feel better, not for the purpose of sexual gratification. Ex. 47 at 18:20-26 (indicating she sprayed his private part to make it feel better).

Second, no evidence otherwise contained in the forensic interviews or introduced at trial tended to demonstrate the whipping B.C.'s penis with a wire or spraying it was physical abuse that resulted in substantial bodily harm. Again, substantial bodily harm requires substantial disfigurement or a substantial loss or impairment of a bodily function. RCW 9A.04.110(4)(b). There was no evidence to support the notion that the whipping or spraying of B.C.'s private parts caused such substantial disfigurement or impairment. As such, B.C.'s statements about the penis whipping and spraying fall outside the scope of the child hearsay statute.

Had counsel researched the statute, counsel would have quickly realized that several of B.C.'s statements contained in Exhibits 43 and 47 were not admissible under the child hearsay statute. Had counsel properly objected, the trial court would have excluded such statements from the evidence shown to the jury. Counsel's failure to object constituted deficient performance.

- b. The erroneous admission of child hearsay caused significant prejudice as to the communication with a minor for immoral purposes count as to B.C.

Aside from B.C.'s statements that Britt showed him sexually explicit photographs and whipped his penis with a wire, there was little other cogent evidence that supported the communication with a minor for immoral purposes charge as to B.C. The erroneous admission of such evidence was therefore prejudicial, as it undermined confidence in the outcome as to this charge.

During J.B.'s trial testimony, J.B. stated that B.C. was not present when Britt showed him the *Two Girls, One Cup* video but was asleep in the living room. RP 1062-63. J.B. further stated that he did not know if Britt ever showed B.C. sexually explicit materials at all. RP 1067.

B.C. similarly testified at trial that he did not know whether his mother made him watch something he did not want to watch. RP 1231. B.C. stated only that his mother showed him pictures that he did not want to see consisting of a pickle jar that "says the D word on it." RP 1231. B.C. clarified that the "D word" means "like the private part of something," "[l]ike when you go number one." RP 1231. However, B.C. never stated that the picture of the pickle jar was sexually explicit, just that it had the "D word on it." RP 1231 (emphasis added). Unlike J.B., B.C. did not indicate he was shown any video at all, stating he did not remember that his mother had shown him anything

from YouTube; he did not otherwise testify at trial to seeing any videos. RP 1226. Thus, B.C.'s trial testimony as to any sexually explicit communication shown to him by Britt was unclear at best.

Although there was ample testimony at trial that B.C. had been forced by Britt to breastfeed from her—which arguably qualifies as communication with a minor for an immoral purpose—this evidence had shaky probative value. B.C. stated Britt breastfed him when “I was five” or younger. RP 1239. He also stated that breastmilk tasted and looked like regular milk, which was directly contradicted by medical witness Yolanda Duralde. RP 1261, 1527. Duralde also described the significant effort it would take for a woman without a breastfeeding child to continue stimulating her breasts to continue producing breastmilk. RP 1502-03. Although Duralde indicated this was possible, she made clear that lactation would not restart spontaneously; instead, “[i]t takes effort if you decide you want to do that,” effort such as breast stimulation about every three hours or of a continued period of time. RP 1525, 1527-28. Undisputed evidence established that Britt stopped breastfeeding her youngest child, who was four at the time of trial, days after she was born. RP 1936-37.

B.C.'s discussion of breastfeeding during his second forensic interview was inconsistent with his trial testimony. While B.C. stated at trial that Britt forcibly breastfed him when he was five or younger, during the forensic interview he stated he was breast fed when he was “seven, eight, six,

five.” Ex. 47 at 21:09–21:19. He described a specific incident on his brother’s birthday where a friend of Britt’s videotaped his forced breastfeeding. Ex. 47 at 21:27–21:57, 25:33–26:17. In addition, B.C. could not cogently describe what breastfeeding was or consisted of when asked directly, stating, “like when a baby is born, when a baby get born . . . it has to get breastfeed [sic].” Ex. 47 at 22:30–22:54. When asked what a baby does, B.C. responded, “they have to breastfeed their mom, uh [slurping noise].” Ex. 47 at 23:03–23:07.

Notably, the breastfeeding incidents or the videotaping of them were the sole evidence the State relied on to support its first degree child molestation and sexual exploitation of a minor charges and, notably, the jury acquitted Britt of these charges. See RP 2069-70, 2078, 2096-2100; CP 170, 172. The acquittal on these charges significantly undermines the probative value of the breastfeeding evidence—if the jury refused to rely on breastfeeding to support child molestation and sexual exploitation charges, it likely also rejected it for the communication with a minor for immoral purposes charge.

Thus, the erroneous admission of B.C.’s forensic interview in which he states his mother showed him sexually explicit material and in which he stated his mother whipped or sprayed his private areas was the only persuasive evidence that Britt communicated with B.C. for an immoral purpose. Because this evidence was admitted in error given Britt’s attorney’s deficient failure to object to it, the outcome of the communication with a minor for a moral

purpose charge with respect to B.C. is gravely undermined. Because Britt did not receive constitutionally required effective assistance of counsel as to the communication with a minor for an immoral purpose charge pertaining to B.C., this conviction must be reversed.

6. THE DNA COLLECTION FEE AND THE CRIMINAL FILING FEE MUST BE STRICKEN FROM BRITT'S JUDGMENT AND SENTENCE BASED ON INDIGENCY

Engrossed Second Substitute House Bill 1783, 65th Leg., Reg. Sess. (Wash. 2018) (hereinafter, HB 1783) applies prospectively to cases currently pending on direct appeal. State v. Ramirez, 191 Wn.2d 732, 747-50, 426 P.3d 714 (2018). When legal financial obligations were impermissibly imposed, the remedy is “for the trial court to amend the judgment and sentence to strike the improperly imposed LFOs.” Id. at 750.

Both the DNA collection fee and the criminal filing fee were imposed against Britt. CP 213. Both fees must be stricken from Britt’s judgment and sentence pursuant to Ramirez’s prospective application of HB 1783.

RCW 43.43.7541, whose title applies to collection of biological samples for the DNA identification system, was amended by HB 1783 to read, “Every sentence imposed for a crime specified in RCW 43.43.754 must include a fee of one hundred dollars unless the state has previously collected the offender’s DNA as a result of a prior conviction.” LAWS OF 2018, ch. 269, § 18 (emphasis added). RCW 43.43.754(1)(a) requires the DNA fee to be

imposed in every adult felony case. RCW 43.43.754(1)(a)(i) also requires the DNA fee to be imposed following a misdemeanor conviction assault in the fourth degree where domestic violence was pled and proven. Britt has a prior domestic violence fourth degree assault conviction. CP 211. Therefore, the DNA fee was already imposed. Because HB 1783 applies prospectively and because the DNA fee was already imposed against Britt from a prior conviction, her instant judgment and sentence should not have imposed the DNA fee. The fee should be stricken. Ramirez, 191 Wn.2d at 749-50.

Likewise, RCW 36.18.020(2)(h) now states that the \$200 criminal filing fee “shall not be imposed on a defendant who is indigent as defined in RCW 10.101.010(3)(a) through (c).” LAWS OF 2018, ch. 269, § 17. Britt’s indigency is well established in the record. See CP 241 (motion and order of indigency indicating that Britt had previously been found indigent by the court). The trial court found Britt indigent and allowed this appeal at public expense. RP 243-44. Britt is currently incarcerated and not earning an income at or above 125 percent of the federal poverty level, which is currently \$15,175 (125 percent of the current federal guideline of \$12,140). See U.S. DEP’T OF HEALTH & HUMAN SERVS., OFFICE OF THE ASST. SEC’Y FOR PLANNING & EVALUATION, Poverty Guidelines (2018), available at <https://aspe.hhs.gov/poverty-guidelines> (last visited Sept. 20, 2018). Thus,

Britt is “entitled to benefit from this statutory change,” so the criminal filing fee must be stricken from Britt’s judgment and sentence.

7. THE TRIAL COURT ERRED IN IMPOSING SENTENCING CONDITIONS BARRING CONTACT BETWEEN BRITT AND HER CHILDREN AND REQUIRING BRITT TO UNDERGO A PSYCHOSEXUAL EVALUATION

- a. The lifetime no-contact order between Britt, her sons, and “any minors” violates her right to parent and her right to have limited contact with her children

The trial court imposed inconsistent provisions in the judgment and sentence. In paragraphs 4.3 and 4.4, the court ordered no contact with J.B. or B.C. and “no contact with minors.” CP 214. The no-contact provision as to J.B. and B.C. contained an asterisk with a notation at the bottom of the page that “Contact allowed if allowed by dependency court.” CP 214. In paragraph 4.6 of the judgment and sentence, the trial court ordered “no contact with: J.B., B.C., or any minors.” CP 216. An arrow is drawn to J.B. and B.C. with a notation, “unless permitted by dependency court.” CP 216. Appendix F to the judgment and sentence reads, “The offender shall not have direct or indirect contact with the victim of the crime or a specific class of individuals: J.B., B.C., or any minor.” CP 223.

The trial court erred in imposing inconsistent no-contact provisions. Two allow contact with B.C. and J.B. subject to the dependency court, but one does not. Furthermore, B.C. and J.B. are not Britt’s only children; the

restriction on her contact with “any minor[s]” imposed in the judgment and sentence violates Britt’s fundamental right to parent.

A sentencing court “may imposed and enforce crime-related prohibitions” under the Sentencing Reform Act of 1981. RCW 9.94A.505(9); State v. Warren, 165 Wn.2d 17, 32, 195 P.3d 940 (2008). Such prohibitions may extend up to the statutory maximum for the crime and are not limited to the standard sentencing range for incarceration. State v. Armendariz, 160 Wn.2d 106, 118-20, 156 P.3d 201 (2007).

Parents have a fundamental liberty interest in the “care, custody, and management” of their children. Santosky v. Kramer, 445 U.S. 745, 753, 102 S. Ct. 1388, 71 L. Ed. 2d 599 (1982). While the imposition of crime-related prohibitions is generally reviewed for abuse of discretion, court’s “more carefully review conditions that interfere with a fundamental constitutional right such as the fundamental right to the care, custody, and companionship of one’s children.” In re Pers. Restraint of Rainey, 168 Wn.2d 367, 374, 229 P.3d 686 (2010) (citation omitted). “Such conditions must be ‘sensitively imposed’ so that they are ‘reasonably necessary to accomplish the essential needs of the State and public order.’” Id. (quoting Warren, 165 Wn.2d at 34).

Any state interference with the fundament right to parent is subject to strict scrutiny. Warren, 165 Wn.2d at 34. Sentencing “conditions that interfere with fundament rights must be sensitively imposed” with “no

reasonable alternative way to achieve the State's interest." Id. at 32, 35. Sentencing courts must therefore consider whether a condition, such a no-contact order, is reasonably necessary in scope and duration to prevent harm to children. Rainey, 168 Wn.2d at 377-82. Less restrictive alternatives, such as indirect contact or supervised visitation may not be prohibited unless there is a compelling State interest barring all contact. Warren, 165 Wn.2d at 32; State v. Ancira, 107 Wn. App. 650, 655, 27 P.3d 1246 (2011).

Lifetime no-contact orders are not automatically appropriate even when the child is a victim of his or her parent's crime. In Ancira, the defendant violated a no-contact order prohibiting contact between him and his wife and child imposed after he kidnapped one of his children. 107 Wn. App. at 652. The trial court imposed a five-year no-contact order as a sentencing condition. Id. at 652-53. This violated Ancira's fundamental right to parent. Id. at 654. While the State's interest was compelling in protecting the children, the State nonetheless failed to show how supervised visitation or indirect contact by telephone or mail could not reasonably accomplish this goal. Id. at 654-55.

In Rainey, likewise, the State failed to show why a lifetime no contact order between Rainey and his daughter was warranted, despite Rainey's having kidnapped his daughter and using her as a pawn to upset her mother. 168 Wn.2d at 379-80.

The duration and scope of a no-contact order are interrelated: a no-contact order imposed for a month or a year is far less draconian than one imposed for several years or life. Also, what is reasonably necessary to protect the State's interests may change over time. Therefore, the command that restrictions on fundamental rights be sensitively imposed is not satisfied merely because, at some point and for some duration, the restriction is reasonably necessary to serve the State's interests. The restrictions length must also be reasonably necessary.

Id. at 381. The court therefore remanded “so that the sentencing court may address the parameters of the no-contact order under the ‘reasonably necessary’ standard.” Id. at 382.

Here, the trial court imposed a lifetime no-contact order between Britt and her daughter, by prohibiting her contact with “any minor[s].” CP 214, 216, 223. The court also imposed a 10-year no-contact order as to J.B. and a lifetime no-contact order as to B.C. CP 214. Because these no-contact orders pertain to Britt's fundamental right to parent, the State must show and the trial court must find that no less restrictive alternative would prevent harm to the children, and any such alternatives must be as narrowly drawn as possible. Rainey, 168 Wn.2d at 381-82. The State did not attempt to make this showing and the trial court did not make any finding as to the availability of a less restrictive alternatives. See SRP⁵ at 28-29 (imposing no-contact order with minors and with respect to B.C. and J.B. without conducting proper analysis).

⁵ Britt refers to the sentencing transcript, with is paginated independently of the other transcripts, as “SRP.”

Accordingly, the trial court's various inconsistent no-contact order provisions were imposed in error and must be reversed.

- b. The record shows that the trial court did not intend to impose a psychosexual evaluation, yet such was erroneously included in the judgment and sentence

The trial court expressly questioned its authority to impose a psychosexual evaluation "in connection with the gross misdemeanor" of communication with a minor for immoral purposes. SRP 29. The State deferred to the court. SRP 29. The court said nothing further, but in the main body of the judgment and sentence, the requirement that Britt undergo a psychosexual evaluation was stricken. CP 214 (striking through "Psychosexual eval & follow up treatment"). Nevertheless, Appendix F to the judgment and sentence requires Britt to undergo a "Psychosexual Eval & follow up." CP 223.

Because the record shows that the trial court did not intend to impose a psychosexual evaluation and related treatment, the provision in Appendix F requiring Britt to undergo a psychosexual evaluation and related treatment must be stricken.

- c. Although the trial court entered an order to amend the judgment and sentence to allow Britt contact with her children and to strike the psychosexual evaluation, this order is worthless under recent Division Two precedent because the Department of Corrections did not participate

Recognizing its sentencing errors, the trial court entered an order amending the judgment and sentence on December 11, 2018. Supp. CP ____ (order to amend judgment and sentence, Dec. 11, 2018).⁶ This order modifies the child no-contact provisions to permit Britt contact consistent with the open adoption agreement she had entered. Appendix at 3-4. The order amending the judgment and sentence also struck the psychosexual evaluation and treatment requirement. Appendix at 5. The order also refers to the no-contact order provisions in the judgment and sentence, noting, “Under these orders, the Department of Corrections has not allowed any contact between Ms. Britt and any of her children. It should be noted that Ms. Britt’s biological daughter . . . was not a named victim in any of the alleged offenses for which M[s]. Britt was convicted.” Appendix at 2.

Under this court’s recent precedent, this order has no binding effect on the Department of Corrections (DOC) because the trial court did not exercise personal jurisdiction over DOC. In re Pers. Restraint of Gossett, ____ Wn.

⁶ Contemporaneously with filing this amended brief, Britt filed a supplemental designation of clerk’s papers. For ease of reference, Britt appends the order amending judgment and sentence to this brief.

App. 2d ___, 435 P.3d 314 ¶¶ 28-32 (2019).⁷ In Gossett, like Britt's case, the trial court issued an amendment and clarification to his judgment and sentence to allow visitation, and also required DOC to provide supervision during visitation.⁸ Id. at ¶¶ 5-6. DOC refused to permit contact under its own policies and challenged the trial court's authority to require it to provide supervised visitation because it had not received notice of the hearing amending the judgment and sentence and the trial court did not have personal jurisdiction over it. Id. at ¶ 13- 17.

This court agreed with DOC, holding that orders amending the judgment and sentence are not binding on DOC:

The order does not indicate that DOC was represented at the hearing. Because the record does not show that DOC was designated a party or made a party by service of process, we conclude that the superior court did not have personal jurisdiction to impose conditions related to supervised visitation on DOC.

Id. at ¶ 30. This court recognized that “directions to DOC to accept and hold a prison are an inherent part of any sentence of imprisonment, and DOC need not for that reason be made a party for all such sentencings.” Id. at ¶ 31. However, because “the sentence had already occurred, Gossett had already

⁷ Pagination to either the Washington Appellate Reporter or the Pacific Reporter is not yet available; thus, Britt provides citation to the numbered paragraphs in the Gossett decision.

⁸ The order included a provision that “the normal supervision by two or more correctional officers in an open room where numerous other inmates may be exercising visitation privileges, is sufficient supervision for the Defendant to have visitation with his children.” Gossett, 435 P.3d 314 ¶ 6.

been remanded to the custody of DOC, and the order amending and clarifying his sentence pertained to the routine management of one of its prisoners. This distinguishes this situation from a typical sentencing after conviction.” Id. Therefore, the order amending the judgment and sentence was not binding on DOC as a matter of law. Id. at ¶ 32.

Under Gossett, there is no requirement that DOC honor the trial court’s order amending Britt’s judgment and sentence. Britt sought and thought she was obtaining relief from the trial court to allow contact with her children pursuant to a recent adoption agreement. She also sought and believed she had obtained relief from having to undergo an invasive psychosexual evaluation. However, under Gossett, DOC is apparently above trial court orders amending judgments and sentences, and need not comply with them. Id. at ¶¶ 31-32.

This has very real consequences for Britt. She was sentenced to a term of 171 months, more than 14 years. CP 215. She obtained the order amending the judgment and sentence to allow her to have the contact she negotiated for by entering an open adoption agreement. See Appendix at 2-4 (referencing adoption agreement). If this order is not honored, she will have no contact with any of her children while they remain children. Further, she will have to undergo an invasive psychosexual evaluation, even though the trial court was

crystal clear at her original sentencing that it did not intend to impose one.
SRP 29.

Under Gossett, DOC need not obey or even acknowledge the trial court's order amending the judgment and sentence unless and until the trial court holds a new hearing at which DOC participates. Gossett, 435 P.3d 314 ¶¶ 31-32. Thus, the trial court's order correcting the judgment and sentence is not worth the paper it's printed on. Britt accordingly requests relief in the form of remand to require her, her attorneys, the State, and DOC attorneys to formulate a new order that will have a binding effect on all parties involved, including DOC.

Gossett authorizes DOC to thumb its nose at duly issued court orders. Following Gossett, even orders of this appellate court striking or altering sentencing provisions—a commonplace occurrence—need not be complied with, given that DOC is not typically a party to appeal. Gossett thus has wide-ranging consequences, seemingly requiring DOC to participate in every hearing involving one of its inmates pertaining to amendments and corrections to judgments and sentences.⁹ Britt requests relief to require DOC's

⁹ Given the sweeping effect of Gossett, this court may wish to involve DOC in this appeal, just to ensure that it comprehends that it will need to participate in all future hearings amending all judgments and sentences in all cases involving one of its inmates, including this one. See RAP 10.6(c) (“The appellate court may ask for an amicus brief at any stage of review, and establish appropriate timeliness for the filing of the amicus brief and answer thereto.”).

participation in drafting the order amending her judgment and sentence in order to ensure DOC complies with any and all such orders.

Finally, the trial court's order amending the judgment and sentence is not binding for another reason. "After review is accepted by the appellate court, the trial court has authority to act in a case only to the extent provided in [RAP 7.2]" RAP 7.2(a). If an order entered by the trial court "will change a decision then being reviewed by the appellate court, the permission of the appellate court must be obtained prior to the formal entry of the trial court decision. A party should seek the required permission by motion." RAP 7.2(e). This rule was not complied with when the trial court entered its order amending Britt's judgment and sentence. For this reason as well, Britt requests relief in the form of remand for a new order that will subject her, the State, and the DOC to its terms.

D. CONCLUSION

Because Britt was denied a fair trial for the forestated reasons, she asks that her convictions be reversed and that this case be remanded for a new and fair trial.

DATED this 20th day of March, 2019.

Respectfully submitted,

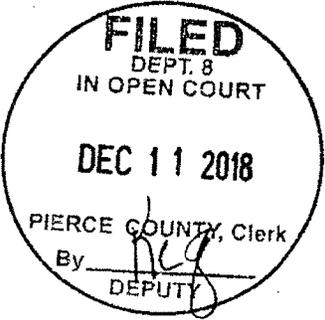
NIELSEN, BROMAN & KOCH, PLLC

A handwritten signature in black ink, appearing to read "Kevin A. March", written over a horizontal line.

KEVIN A. MARCH
WSBA No. 45397
Office ID No. 91051

Attorneys for Appellant

APPENDIX



6142 12/13/2018 1 0016

3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

SUPERIOR COURT OF THE STATE OF WASHINGTON
FOR PIERCE COUNTY

STATE OF WASHINGTON,)
Plaintiff,)
V.)
NATASHA MONIQUE BRITT,)
(AKA NATASHIA MONIQUE BRITT),)
Defendant.)

16-1-03808-7
No. 18-1-03042-2

ORDER TO AMEND JUDGEMENT
AND SENTENCE (Regarding No Contact
Provisions and Psychosexual Eval.)

The Judgement and Sentence on the above captioned case, entered on December 8, 2017,
listed in Paragraph 4.3, "The defendant shall not have contact with B.C.* and J.B.* (name, DOB),
including, but not limited to, personal, verbal, telephonic, written or contact through a third party
for 10 years, re: J.B. or life re: B.C. (not to exceed the maximum statutory sentence)." Then below
this in Paragraph 4.4 OTHER, in relevant part it says, "No contact with minors"; "*Contact allowed
if allowed by a dependency court".

ORDER TO CORRECT
JUDGEMENT AND SENTENCE
(Regarding No Contact Provisions
And Psychosexual Eval.)

6142 12/13/2018 1 0017

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

In Paragraph 4.6, the order says in relevant part, "The court orders that during the period of supervision the defendant shall: [check] have no contact with J.B., B.C, unless permitted by dependency court, or any minors."

In APPENDIX "F", it says, "The Court may also order any of the following special conditions: [check] (II) The offender shall not have direct or indirect contact with the victim of the crime or a specified class of individuals: J.B., B.C., or any minor."

Under these orders, the Department of Corrections has not allowed any contact between Ms. Britt and any of her children. It should be noted that Ms. Britt's biological daughter, D.D.C., AKA, D.J. (DOB 5/10/13) was not a named victim in any of the alleged offenses for which Mr. Britt was convicted.

There is now an agreed "Stipulation, Agreement and Order Regarding Communication and Contact Between Birth Parent, Mother Natasha Britt Child Adoptee and Adoptive Parents", entered under 18-7-00536-0, D.D.C, AKA, D.J. (DOB 5/10/13), 18-7-00537-8, B.C. (DOB 6/29/07), and 18-7-00538-6, J.O. [AKA J.B.] (DOB 8/9/05), and Ms. Britt has signed an agreed order of termination under the Dependency case numbers. And Furthermore, that Agreed Order from the Dependency courts allows for Ms. Britt to have only very limited telephonic contact with the children (2 times a year with D.D.C.) and as approved by the boys' therapist and at the discretion of each child, in addition to other restrictions; but also allows sending of presents twice per year, emails to the caregivers two times a year, and allows that the contact between the birth parent and the children may be increased on agreement of the parties but may also be terminated by the adoptive parents if there as any attempt at contact outside that order.

ORDER TO CORRECT
JUDGEMENT AND SENTENCE
(Regarding No Contact Provisions
And Psychosexual Eval.)

Department of Assigned
Counsel
949 Market Street Suite 334
Tacoma, Washington 98402

1 Finally, the requirement for a psychosexual evaluation was stricken by the court from 4.4
2 and 4.6, but was apparently left in as an oversight of the parties in Appendix "F"

3
4 ORDERED

5 The COURT HEREBY ORDERS the following Modifications to the Judgement and
6 Sentence in this matter:

- 7
8 1) Section 4.3 contained in the Judgement and Sentence is stricken, and the following language
9 is entered in its place:

10
11 "4.3 NO CONTACT

12 The Defendant shall not have contact with B.C. (DOB 6/29/07) and J.B. (DOB 8/9/05) except as
13 allowed by the Stipulation, Agreement And Order Regarding Communication and Contact Between
14 Birth Parent, Mother Natishia Britt Child Adoptee and Adoptive Parents under 18-7-00537-8 and
15 18-1-00538-6 for Life with regard to B.C. and 10 years with regard to J.B."

- 16
17
18 2) Section 4.4 from the Judgement and Sentence is modified as follows:

19 The Language indicating "No contact with minors" is stricken, and replaced with the following:
20 "The defendant may have no contact with minors except the defendant may have contact with
21 D.D.C, AKA, D.J. (DOB 5/10/13), and the defendant may have contact with B.C. (DOB 6/29/07)
22 and J.B. (DOB 8/9/05) as allowed by the Stipulation, Agreement And Order Regarding
23 Communication and Contact Between Birth Parent, Mother Natishia Britt Child Adoptee and
24 Adoptive Parents under 18-7-00537-8 and 18-1-00538-6 for Life with regard to B.C. and 10 years
25 with regard to J.B."

26
27
28 ORDER TO CORRECT
JUDGEMENT AND SENTENCE
(Regarding No Contact Provisions
And Psychosexual Eval.)

3

Department of Assigned
Counsel

949 Market Street Suite 334
Tacoma, Washington 98402

6142 12/13/2018 1 0019

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

3) Section 4.6 from the Judgement and Sentence is modified as follows:

The language, "have no contact with: J.B, B.C., or any minors unless permitted be dependency court", shall be stricken, and replaced with the following:

"The defendant may have no contact with minors except the defendant may have contact with D.D.C, AKA, D.J. (DOB 5/10/13), and the defendant may have contact with B.C. (DOB 6/29/07) and J.B. (DOB 8/9/05) as allowed by the Stipulation, Agreement And Order Regarding Communication and Contact Between Birth Parent, Mother Natishia Britt Child Adoptee and Adoptive Parents under 18-7-00537-8 and 18-1-00538-6 for Life with regard to B.C. and 10 years with regard to J.B."

4) Appendix "F", under special conditions, (II), is modified as follows:

"The offender shall not have direct or indirect contact with the victim of the crime or a specified class of individuals: J.B., B.C., or any minor." Is hereby stricken, and replaced with the following:

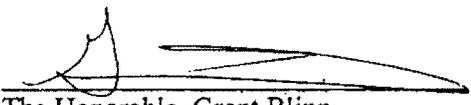
"The defendant may have no contact with minors except the defendant may have contact with D.D.C, AKA, D.J. (DOB 5/10/13), and the defendant may have contact with B.C. (DOB 6/29/07) and J.B. (DOB 8/9/05) as allowed by the Stipulation, Agreement And Order Regarding Communication and Contact Between Birth Parent, Mother Natishia Britt Child Adoptee and Adoptive Parents under 18-7-00537-8 and 18-1-00538-6 for Life with regard to B.C. and 10 years with regard to J.B."

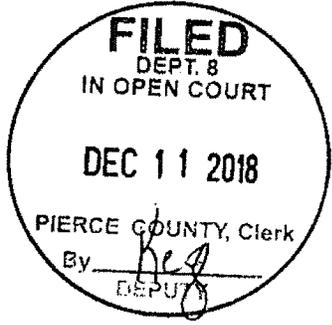
ORDER TO CORRECT
JUDGEMENT AND SENTENCE
(Regarding No Contact Provisions
And Psychosexual Eval.)

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

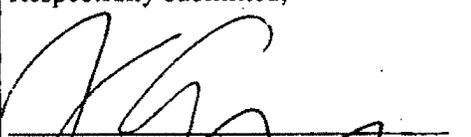
5) Finally, Appendix "F", under special conditions, (VII), is modified as follows: The language "Psychosexual Eval and Follow up" is stricken.

SO ORDERED this 6th day of December, 2018,


The Honorable, Grant Blinn
Superior Court Judge, Dept. #8



Respectfully submitted,


Travis R. Currie, WSBA # 29298
Counsel for Ms. Britt

Agreed,


John Cummings, WSBA # 40705
Deputy Prosecuting Attorney

ORDER TO CORRECT
JUDGEMENT AND SENTENCE
(Regarding No Contact Provisions
And Psychosexual Eval.)

NIELSEN, BROMAN & KOCH P.L.L.C.

March 20, 2019 - 10:35 AM

Transmittal Information

Filed with Court: Court of Appeals Division II
Appellate Court Case Number: 51249-1
Appellate Court Case Title: State of Washington, Respondent v. Natasha M. Britt, Appellant
Superior Court Case Number: 16-1-03808-7

The following documents have been uploaded:

- 512491_Briefs_20190320103457D2801630_0981.pdf
This File Contains:
Briefs - Appellants - Modifier: Amended
The Original File Name was ABOA2 51249-1-II.pdf

A copy of the uploaded files will be sent to:

- PCpatcecf@piercecountywa.gov
- jcummin@co.pierce.wa.us

Comments:

Copy mailed to: Natasha Britt, 404301 Washington Corrections Center for Women 9601 Bujacich Rd NW Gig Harbor, WA 98402

Sender Name: John Sloane - Email: Sloanej@nwattorney.net

Filing on Behalf of: Kevin Andrew March - Email: MarchK@nwattorney.net (Alternate Email:)

Address:
1908 E. Madison Street
Seattle, WA, 98122
Phone: (206) 623-2373

Note: The Filing Id is 20190320103457D2801630