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

IN RE THE PERSONAL RESTRAINT
PETITION OF:

DARREL LORNE HARRIS,

Petitioner.

NO. 51942-9-II
[14-1-00309-1]

STATE'S RESPONSE TO PERSONAL
RESTRAINT PETITION

A. ISSUES PERTAINING TO PERSONAL RESTRAINT PETITION

1. Does petitioner successively raise reformulated attacks upon the effectiveness of his trial counsel by asserting new allegations to support an already rejected ground for relief?

2. Has petitioner failed to prove it deficient for defense counsel not to call partisans petitioner now offers to vouch for his character since any confidential conversations about them remain beyond the record, counsel executed a legitimate strategy with a witness less vulnerable to impeachment and petitioner was not prejudiced by the absence of his inadmissible evidence?

B. STATUS OF PETITIONER

Petitioner is restrained pursuant to a judgment that became final June 8, 2017. Apx.A-B This Court affirmed his convictions for raping and molesting his 5-year old great niece (J.J.) and indecent liberties against J.J.'s mother K.M. Apx.C. That decision summarized his crimes:

1 In November 2013, Harris lived with his niece, K.M. and K.M.'s daughter,
2 J.J., at Harris's home. At the time, Harris was 47 years old, K.M. was 25
years old, and J.J. was 5 years old.

3 On November 6, K.M. awoke to Harris touching her vagina. K.M. moved
4 his hand away. Harris told her that he wanted a relationship with her, but
5 she refused and left the room. Through the rest of the day, Harris drove
6 K.M. to a doctor's appointment, the two had lunch together, and Harris
7 went to work. K.M. hugged Harris before he left for work. But by the time
8 Harris returned home after work, K.M. and J.J. had moved to the home of
9 Theresa Midgette, K.M.'s aunt.

10 On November 9, K.M. called the police to report the sexual assault.
11 Officer Alex Richards responded and spoke to her. K.M. told Officer
12 Richards about Harris touching her. K.M. said that she did not report it
13 earlier because Harris had threatened to kill her in the past. K.M. also said
14 that Harris had abused J.J. J.J. told Officer Richards that Harris touched
15 her in a "private spot" and that he put "a finger in there." Verbatim Report
16 of Proceedings (VRP) at 279-80.

17 The next day, K.M. took J.J. to the emergency room to be examined by
18 Dr. Leah Roberts. Dr. Roberts did not find any physical evidence of abuse.
19 However, J.J. did describe what Harris had done to her to Dr. Roberts,
20 forensic interviewer Keri Arnold, pediatric practitioner Michelle Breland,
21 K.M., and Theresa Midgette. ...

22 Apx.C at 3-4.

23 More specifically, financial hardship drove K.M. into petitioner's Spanaway home with
24 her daughter. 4RP 398-403. K.M. turned to him because he is her uncle. *Id.* K.M. relied on
25 public assistance for the food she and her daughter ate. 4RP 405, 448. Instead of paying rent,
K.M. contributed by assisting him with landscaping or real estate work. 4RP 404-06. But then
K.M. awoke one night to find him in her bed "rubbing [her] clitoris." 4RP 410-11. She moved
his hand away. *Id.* Petitioner told K.M. he wanted her "as a companion;" he "wanted
companionship." 4RP 413. By companionship he meant she could live with him in exchange for
sex. 4RP 418. She rejected his proposition, reminding him she "was his niece." 4RP 413. He
"didn't care," as "he wouldn't tell anybody." *Id.* He was angered by her refusal to become her

1 uncle's concubine. *Id.* He responded by writing her a note explaining the consequences of her
2 refusal to provide him the companionship he desired:

3 You are not my companion. You are a roommate. Act like a roommate. Stop
4 borrowing my clothes. Stop asking for rides. Stop acting like a family.

5 4RP 414-16; Ex.8. The event was difficult for K.M. to comprehend. 4RP 416-17. Petitioner's
6 unnatural approach to their relationship was revealed during his testimony. 6RP 701-04, 714,
7 (2/24/15) 8. He acknowledged "hugging" and "holding" her in what he described as harmless
8 displays of affection. 6RP 702-04. He acknowledged touching her lower back, yet adamantly
9 denied rubbing her butt, conceding that would be "a little" inappropriate. 6RP 703-04, 714,
10 (2/24/15) 8. But then he was confronted with video of him running his hand down her lower
11 back and rubbing her butt with a motion that concluded with her butt cupped in his hand. *Id.* It
12 refreshed his recollection, so he reluctantly admitted rubbing her butt as well. *Id.*

13 He also spent some time alone with 5-year old J.J. RP (2/24) 10. With an officer present,
14 she explained how he put his finger in her "private spot," pointing to her vagina. 3RP 259. He
15 told her not to tell. *Id.* She described the pain he caused her while talking to a doctor. 3RP 294-
16 95, 432. J.J. revealed "he put it where [she] poop[ed] from and it felt wet and [she] told him
17 no." *Id.* To a forensic interviewer, J.J. explained "it" was his "private spot" or "gut." Ex.1. At
18 trial, J.J. told jurors petitioner did "something real bad," "touched [her] in the wrong places,"
19 "girl places." 4RP 387. He "peed on her." 3RP 352. He touched her with his "long thing." 3RP
20 354-55. He told J.J. he would take her mom away if J.J. told or complained about pain in her
21 privates. 3RP 294. Even after being removed from his house, J.J. was very scared. 3RP 354. She
22 cried *Id.* She needed to be held. *Id.* Usually before bed or bathing, fear prompted her to talk to
23 an aunt about the abuse. 3RP 352-53.
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1 Petitioner's convictions for those crimes were affirmed on appeal over the several claims
2 raised, which included ineffective assistance of counsel. On appeal, that legal ground was based
3 on objections counsel did not make and an exhibit that was not admitted. Apx.C at 1. In this
4 PRP, where petitioner is again represented by his appellate counsel, the same legal ground is
5 based on character witnesses that were not called. They have nice things to say about petitioner
6 and less pleasant things to say about K.M. Missing is an affidavit of trial counsel from which to
7 assess what, if anything, he discovered about those witnesses or why they may not have fit into
8 the discernable strategy he ably presented in petitioner's defense.

9
10 C. ARGUMENT

11 Personal restraint procedure has origins in the State's habeas corpus remedy, guaranteed
12 by article 4, section 4, of the State Constitution. A personal restraint petition is not a substitute
13 for appeal. *In re Pers. Restraint of Hagler*, 97 Wn.2d 818, 823-824, 650 P.2d 1103 (1982). In
14 this collateral action, petitioner must prove constitutional error resulted in actual prejudice.
15 Mere assertions are insufficient to demonstrate prejudice. The rule that constitutional errors
16 must be proven harmless beyond a reasonable doubt has no application. *In re Pers. Restraint of*
17 *Mercer*, 108 Wn.2d 714, 718-721, 741 P.2d 559 (1987); *Hagler*, 97 Wn.2d at 825; *Woods*, 154
18 Wn.2d 409. A petitioner must show a fundamental defect resulted in a complete miscarriage of
19 justice to obtain collateral relief for alleged nonconstitutional error. *In re Pers. Restraint of*
20 *Cook*, 114 Wn.2d 802, 812 792 P.2d 506 (1990); *Woods*, 154 Wn.2d 409. This is a higher
21 standard than actual prejudice. *Cook*, at 810. Inferences must be drawn in favor of the
22 judgment's validity. *Hagler*, 97 Wn.2d at 825-826. Reviewing courts have three options:

- 23
24 1. If a petitioner fails to meet the threshold burden of showing actual
25 prejudice from constitutional error or a fundamental defect resulting in a
 miscarriage of justice, the petition must be dismissed;

- 1 2. If a petitioner makes a prima facie showing of actual prejudice or
2 manifest injustice, but the merits cannot be determined on the record, the
3 court should remand for a hearing on the merits or for a reference hearing
4 pursuant to RAP 16.11(a) and RAP 16.12;
- 5 3. If the court is convinced a petitioner has proven actual prejudice arising
6 from constitutional error or a miscarriage of justice, the petition should
7 be granted.

8 ***In re Pers. Restraint of Hews***, 99 Wn.2d 80, 88, 660 P.2d 263 (1983).

- 9 1. PETITIONER'S REFORMULATION OF THE ALREADY REJECTED
10 LEGAL GROUND OF INEFFECTIVE TRIAL COUNSEL SHOULD BE
11 SUMMARILY DISMISSED AS SUCCESSIVE BECAUSE IT SIMPLY
12 SUBSTITUTES PRIOR FACTUAL ALLEGATIONS OF EXHIBITS
13 NOT ADMITTED FOR NEW ONES OF WITNESSES NOT CALLED.

14 A claim rejected on its merits on direct appeal will not be reconsidered in a subsequent
15 personal restraint petition unless the petitioner shows the ends of justice are served thereby. ***In***
16 ***re Pers. Restraint of Jeffries***, 114 Wn.2d 485, 487-88, 789 P.2d 731 (1990). Simply revising a
17 previously rejected legal argument neither creates a new claim nor constitutes good cause to
18 reconsider the original claim. Identical grounds may be proved by different factual allegations.
19 So also, identical grounds may be supported by different legal arguments. *Id.* at 487; ***Sanders v.***
20 ***United States***, 373 U.S. 1, 16, 83 S. Ct. 1068 (1963)); ***In re Pers. Restraint of Lord***, 123 Wn.2d
21 296, 329-30, 868 P.2d 835 (1994). A PRP is not meant to be a forum for relitigation of issues
22 already considered on appeal; it is reserved for remedying fundamental errors which actually
23 prejudiced the prisoner. ***Lord***, 123 Wn.2d at 329-30.

24 Petitioner takes another run at his well-proved convictions for raping and molesting his
25 5-year old great niece and the indecent liberty he committed against his niece by revising the
 ineffective assistance ground that took two forms in his appeal. Now he endeavors to support
 that legal ground with new factual allegations counsel deficiently assessed the utility of a few
 character witnesses. If allowed, petitioner will receive two full-dress appeals to address one

1 ground—the adequacy of his trial counsel. This is precisely the type of piecemeal, resource
2 devouring, approach to collateral attacks *Jeffries* aimed to prevent. *E.g. Jeffries*, 114 Wn.2d at
3 488 (“Thus, for example, a claim of involuntary confession predicated on alleged psychological
4 coercion does not raise a different ground than does one predicated on physical coercion.”); *Cf.*
5 *In re Pers. Restraint of Wilson*, 169 Wn.App. 379, 388, 279 P.3d 990 (2012).

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7 2. PETITIONER’S SUCCESSIVELY RAISED CLAIM DOES NOT COME
8 CLOSE TO OVERCOMING THE BURDEN OF PROOF APPLIED TO
9 COLLATERAL ATTACKS, AS TRIAL COUNSEL’S REASON FOR
10 HIS DISCERNABLE STRATEGY REMAINS BEYOND THE RECORD
11 AND THE NEWLY IDENTIFIED CHARACTER EVIDENCE IS FAR
12 FROM OUTCOME DETERMINATIVE, IF EVEN ADMISSIBLE.

13 Collateral relief undermines the principles of finality, degrades the prominence of trial
14 and may deprive society the right to punish guilty offenders. *Id.*; *In re Pers. Restraint of*
15 *Woods*, 154 Wn.2d 400, 409, 114 P.3d 607 (2005). These grave costs require collateral relief to
16 be limited. *Id.* An ineffective assistance claim requires petitioner to show counsel's performance
17 was prejudicially deficient. *In re Pers. Restraint of Crace*, 174 Wn.2d 835, 840, 280 P.3d 1102
18 (2012); *Strickland v. Washington*, 466 U.S. 668, 689, 104 S.Ct. 2052 (1984). "Prejudice"
19 means a reasonable probability the challenged convictions were a consequence of counsel's
20 presumptively professional representation. *Id.* at 840, 847.

21 a. Affidavits petitioner procured from his friends and family cannot
22 support an ineffective assistance claim because they do not reveal
23 the challenged counsel’s reason for strategy he manifestly pursued
24 by calling a less impeachable fact witness to advance a competent
25 defense against persuasive proof of petitioner’s guilt.

It is very tempting for petitioners to second-guess counsel's assistance after an adverse
result. *Strickland*, 466 U.S. at 689. The decision whether to call a character witness is typically
considered a strategic matter subject to differing opinions incapable of supporting an ineffective
assistance claim. *Matter of Lui*, 188 Wn.2d 525, 545, 397 P.3d 90 (2017). A petitioner with
proof of counsel’s failure to make an informed decision about the utility of a particular witness

1 may be able to establish error; however, such an allegation must be proved by more than a self-
2 serving affidavit. *In re Pers. Restraint of Connick*, 144 Wn.2d 442, 451, 28 P.3d 729 (2001);
3 *In re Pers. Restraint Williams*, 111 Wn.2d 353, 759 P.2d 436 (1988); *State v. Jury*, 19
4 Wn.App. 256, 576 P.2d 1302 (1978). Yet our Supreme Court never held effective representation
5 requires independent investigation. *State v. A.N.J.*, 168 Wn.2d 91, 109, 225 P.3d 956 (2010).

6 Counsel must make reasonable investigations or make a reasonable decision that makes
7 particular investigations unnecessary. *Strickland*, 466 U.S. at 691. Judicial scrutiny of counsel's
8 performance is highly deferential. *Id.* The investigation required, if any, varies according to
9 each case. *A.N.J.*, 168 Wn.2d at 111-112. Defense attorneys are not called upon "to scour the
10 globe on the off chance something will turn up..." *Rompilla v. Beard*, 545 U.S. 374, 383, 125
11 S. Ct. 2456 (2005); *Wiggins v. Smith*, 539 U.S. 510, 525, 123 S. Ct. 2527 (2007). Reasonably
12 diligent counsel may draw a line when there is good reason to think further investigation would
13 be a waste. *Id.* The fact useful evidence might have come from additional investigation may
14 likewise fail to prove counsel constitutionally deficient, for defendants are not entitled to perfect
15 counsel. *State v. Adams*, 91 Wn.2d 86, 91, 586 P.2d 1168 (1978) (quoting *Beasley v. United*
16 *States*, 491 F.2d 687, 696 (6th Cir. 1974)).

17 Most trial strategy is not explained on the record. There are legitimate reasons to forego
18 calling seemingly favorable witnesses. Counsel can refrain from calling character witnesses to
19 abide by a client's instructions. *In re Pers. Restraint of Benn*, 134 Wn.2d 868, 896, 952 P.2d
20 116 (1998). Experienced trial lawyers know testimony may appear favorable on paper only to
21 appear harmfully fabricated from the stand. *State v. Piche*, 71 Wn.2d 583, 590, 430 P.2d 522
22 (1967). Counsel's choice often turns on nuanced predictions about witness demeanor, e.g.,

23 [t]he expressions of his countenance, how he sits ..., whether he is inordinately
24 nervous, his coloration during critical examination, the modulation or pace of his
25 speech and other non-verbal communication.

In re Detention of Stout, 159 Wn.2d 357, 383, 150 P.3d 86 (2007). If stultified by post-trial

1 scrutiny regarding “whether to put some witnesses on the stand and leave others off,” counsel
2 will lose the freedom essential to skillful representation. *In re Pers. Restraint of Stenson*, 142
3 Wn.2d 710, 735, 16 P.3d 1 (2001). No attorney is obliged to pursue doubtful strategies. *State v.*
4 *Brown*, 159 Wn.App. 366, 371-72, 245 P.3d 776 (2011).

5 Petitioner’s collateral attack presents several declarations from people apparently willing
6 to serve as favorable character witnesses, explains why he perceives that testimony to be useful,
7 then concludes no reasonable counsel could have abstained from using it at trial. Missing is an
8 affidavit from a member of petitioner’s defense team on how the case was investigated. Still
9 beyond the record is the truth about what, if anything, counsel knew about character witnesses
10 now proposed. During confidential attorney-client conversations undesirable attributes of those
11 witnesses may have been explored. Or petitioner may have neglected to give counsel accurate
12 information about them. Petitioner bears the burden of proving counsel was deficient, which
13 cannot be achieved by presenting a record without proof of *why* counsel proceeded as he did.

14 The available record reveals a five-stage strategy for the defense:

- 15 (1) Convince jurors that K.M. is not credible;
- 16 (2) Attribute J.J.’s accounts of being sexually abused by petitioner to K.M.’s
17 allegedly nefarious influence over her daughter;
- 18 (3) Tap into the CIS affect; *i.e.*, persuade jurors to find doubt in the absence
19 of forensic or trace evidence like DNA;
- 20 (4) Counter the challenged evidence against petitioner with any persuasive
21 force attending his willingness to take the stand to deny wrongdoing;
- 22 (5) Try to indirectly corroborate petitioner’s denial and undermine K.M. with
23 testimony from a neighbor presented as an impartial friend to K.M. and
24 petitioner who observed conduct from which inferences favorable to the
25 defense might be drawn if jurors credited the neighbor’s account.

24 Groundwork for this strategy was laid in opening statement. Counsel framed the case as “based
25 ... solely upon the testimony of [K.M.]” RP 10. J.J.’s statements were acknowledged, then cast
as directly flowing from K.M. *Id.* 10-11. The absence of corroborating forensic evidence was

1 emphasized. *Id.* Counsel summarized how K.M.'s credibility problems would be exposed. *Id.*
2 Counsel introduced the neighbor, Janet Satre, who was anticipated to depict victim demeanor as
3 inconsistent with the abuse described. *Id.* at 14-16. After stressing petitioner's right to remain
4 silent, counsel revealed jurors would nonetheless hear him deny the accusations. *Id.* at 16.

5 Counsel's cross-examinations followed a pattern of trying to impeach K.M.'s credibility
6 while attributing all J.J.'s accounts of abuse to coaching allegedly perpetrated by K.M.¹ Counsel
7 introduced Satre through K.M. as a neighbor K.M. periodically visited, to include the day K.M.
8 awoke to petitioner touching her vagina. 4RP 472, 476. Yet K.M. disagreed with the regularity
9 of contact and depth of relationship with Satre that counsel's cross-examination proposed. 4RP
10 475-76. Counsel elicited K.M.'s dependency on welfare while petitioner was presented as a man
11 who worked; a relative who repeatedly gave K.M. a place to live with her daughter when they
12 had nowhere else to turn.² K.M. was indirectly framed as a mooch who refused to contribute to
13 minor household expenses or chores. 4RP 448 (Q: "He just said come on in, you can just live
14 here and do nothing?"), 449-51. K.M. was in this way thematically depicted as an ingrate who
15 bit the hand that fed her by lashing out with accusations once met with an ultimatum—
16 contribute as agreed or leave. 4RP 448-51, 457, 463, 479.

17 While K.M. testified, petitioner tried to cultivate contempt for her by shaking his head,
18 laughing under his breath and smirking. 4RP 497-99. The court admonished him to refrain from
19 improper attempts to influence jurors by emoting "through the entire trial." 4RP 498-99. Satre
20 was called as the segue into petitioner's defense. 6RP 642. Impartiality on Satre's part was
21 implied through her claim of having received assistance from K.M. as well as the substantial
22 time Satre supposedly spent in her home hosting K.M. and J.J. 6RP 643-50. Satre claimed not to
23 have been influenced by her longer relationship with petitioner. 6RP 654-57.

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¹ *E.g.* 3RP 268, 270, 272-73, 277-80, 282, 299, 360; 4RP 394-95, 459, 469, 472, 476-85; 5RP 554, 569, 574-77, 604-05, 608.

1 The main event foreshadowed in petitioner's opening statement followed, carrying with
2 it all the suspense of him casting aside his right to remain silent to subject his plea of not guilty
3 to the prosecutor's cross-examination. RP 16; 6RP 660. With counsel's advance work complete,
4 petitioner was presented as a homeowner; as a stable-diligent worker; as a man wrongly accused
5 of sexual misconduct by a selfish relative he several times selflessly sheltered when she needed
6 a place to live with her young child. 6RP 660-62, 674, 676-77, 681-82. According to him, she
7 was nonetheless "inconsiderate." 6RP 677. She never followed through with promises to pick
8 up after herself or her daughter, or to look for work. 6RP 677. He made dinner for them; she left
9 dirty dishes for him. 6RP 676, 678. He gave her chance after chance to change. 6RP 677-79.
10 Reaching his limit, he wrote a note demanding the changes she periodically promised to make;
11 then, next thing he knew, he was falsely accused of incestuous abuse. 6RP 679-83.

13 Amid enthusiasm to cast himself as the wholesome benefactor, petitioner opened a door
14 to cross about his admittedly inappropriate act of rubbing his own niece's butt during a caress
15 caught on video. 6RP 703-04, 714, (2/24/15) 8. He cupped her butt in hand before ending that
16 embrace. *Id.* At first, he denied doing so, but admitted it once confronted with the prospect of
17 jurors watching the video. *Id.* Prior to back peddling on whether he rubbed his niece's butt, he
18 described the "harmless affection" he directed toward her, like "holding[.]" 6RP 702. Another
19 credibility-undermining reversal came when his adamant denial of ever being alone with J.J.
20 morphed into an admission to spending a little time alone with her. RP(2/24) 10-11. Time that
21 aligned with her account of him touching her when her mom was outside or sleeping. 4RP 393.

23 Petitioner's counsel endeavored to recover from these setbacks in a summation which
24 returned to the strategy appreciable in his approach. The State's case was cast as based upon the
25 K.M.'s unfounded accusations. RP(2/24) 70. K.M.'s account of the assault was characterized as

² 4RP 443, 446-47, 473, 476-77.

1 a “story” “concocted” by a woman “angered” about eviction from a home she was comfortably
2 residing in rent free. *Id.* at 72-73. The absence of forensic evidence to corroborate testimony
3 was stressed. *Id.* at 70, 75, 77-78, 88. J.J.’s accounts of abuse were attributed to her mother. *Id.*
4 at 83-85. Petitioner’s denials were presented as corroborated by Satre’s purported observations.
5 *Id.* at 85-86. No fault can be thrown at counsel’s feet for the fact 12 jurors who watched the trial
6 credited the persuasive proof of petitioner’s guilt. “Generally, choosing a particular defense is a
7 strategic decision for which there is no correct answer, but only second guesses.” *In re Pers.*
8 *Restraint of Davis*, 152 Wn.2d 647, 745, 101 P.3d 1 (2004). Counsel reasonably defended
9 against the charges by making the case about K.M.’s credibility and a lack of forensic evidence
10 instead of putting petitioner’s character on trial; by making the case about the State’s evidence
11 instead of the jury’s impression of petitioner’s morality.

12 Petitioner’s failure to provide information available to him through trial counsel defeats
13 his request for a reference hearing. For reference hearings cannot be properly ordered to help
14 petitioners *find* facts they need to prove error and prejudice. Our Supreme Court explained the
15 showing petitioners “must make to support a request for a reference hearing.” *In re Pers.*
16 *Restraint of Rice*, 118 Wn.2d 876, 885, 828 P.2d 1086 (1992). “As a threshold matter, the
17 petitioner must state ... the evidence available to support the factual allegations.” *Id.*; RAP
18 16.7(a)(2)(i)). “[A] mere statement of evidence the petitioner believes will prove his factual
19 allegations is not sufficient.” *Id.* at 886. Our Supreme Court has made clear:

21 [T]he purpose of a reference hearing is to resolve genuine factual disputes, not to
22 determine whether the petitioner actually has evidence to support his allegations.

23 *Id.* To be eligible for a reference hearing a petitioner: “[m]ust demonstrate that he has competent
24 admissible evidence to establish the facts that entitle him to relief.” *Id.*

25 Trial counsel owes petitioner a continuing duty of care, which includes an obligation to
turn over a copy of the case file documenting services rendered upon request. RPC 1.9, 1.16.

1 Yet petitioner, who is again assisted by appellate counsel, did not obtain an affidavit from trial
2 counsel regarding his tactics, strategy or knowledge of facts the PRP imputes to him, or even
3 relevant portions of petitioner's file. From the PRP it remains unclear if an attempt was made to
4 acquire that information. Instead, petitioner advances his claim of ineffective assistance from
5 still unexplained omissions characterized by him as negligence on trial counsel's part. The same
6 is true of the Walmart report referenced in the PRP at page 23. Petitioner says the report could
7 not be secured without a subpoena. While the report could not have been compelled without a
8 subpoena, it does not follow Walmart would refuse to provide one upon request. Petitioners
9 cannot support requests for scarce-resource devouring reference hearings to conduct discovery
10 with untested assumptions about the probability of third parties withholding information that
11 may not exist and they were never asked to provide.

12 Trial counsel's actual reasons for challenged actions or omissions remain outside the
13 record petitioner was obliged to perfect. There is no proof of deficiency to overcome counsel's
14 presumed effectiveness. This unfounded claim should fail without commandeering a superior
15 court department to hold the equivalent of a civil-bench trial devoted to a hindsight evaluation
16 of an alternative strategy dependent on biased character witnesses without personal knowledge
17 about relevant events that transpired in petitioner's home. Testimony from the eyewitnesses to
18 those events were ably tested in an adversarial proceeding where jurors watched petitioner
19 reverse his denial of inappropriately rubbing his niece's butt and claim he never spent time
20 alone with the 5-year old he was convicted of raping. It is worth noting the sister who vouches
21 for petitioner apparently does not disbelieve J.J. about the abuse, but just assumes the crimes
22 must have been committed by someone other than the brother jurors unhindered by a sister's
23 bias disbelieved.

1 b. There is no proof of a constitutional deficiency much less actual
2 prejudice in the absence of petitioner’s newly proposed character
3 witnesses at his trial since, if admissible, their assessment of his
4 public reputation has little bearing on whether he clandestinely
5 committed sex crimes against relatives in the privacy of his home.

6 Character evidence rarely bears directly on disputed facts. *State v. Thomas*, 110 Wn.2d
7 859, 865, 757 P.2d 512 (1988). For it “does not prove or disprove an element of a charged crime
8 nor prove or disprove a particular defense. Its relevance is to permit ... the jury to infer from the
9 ... character trait that it is unlikely or improbable that the defendant committed the charged act.”
10 *Id.* But such inferences are less reliably drawn when deciding “[t]he crimes of indecent liberties
11 and incest” for they “concern sexual activity, which is normally an intimate, private affair not
12 known to the community.” *State v. Jackson*, 46 Wn.App. 360, 365, 730 P.2d 1361 (1986). No
13 less can be said of child rape or molestation. *E.g.*, *State v. Rice*, 159 Wn.App. 545, 575, 246
14 P.3d 234 (2011) (teacher’s sexual contact with children); *C.J.C. v. Corp. of the Catholic Bishop*
15 *of Yakima*, 138 Wn.2d 699, 719–20, 985 P.2d 262 (1999) (priest molests boy); *Retirement Bd.*
16 *Of Maynard v. Tyler*, 83 Mass.App.Ct. 109, 981 N.E.2d 740 (2013) (molestation by firefighter).
17 “One’s reputation for sexual activity, or lack thereof, may have no correlation to one’s actual
18 sexual conduct.” *Jackson*, 46 Wn.App. at 365. The probative value of a public reputation for
19 sexual decency is therefore low in a child sex or indecent liberties case. *See Id.*; ER 403.

20 Traits like honesty and truthfulness are not pertinent to charges of sexual misconduct for
21 neither makes one’s commission of it less likely. *See State v. Robinson*, 44 Wn.App. 611, 623,
22 722 P.2d 1379 (1986). A petitioner’s reputation for those traits is only admissible to rebut an
23 attack upon them. *State v. Deach*, 40 Wn.App. 614, 618, 699 P.2d 811 (1985). Cross-
24 examination short of a “slashing” attack, which only contradicts a petitioner, does not enable the
25 petitioner to bolster his testimony with favorable character witnesses. *Id.* These limitations align
with the justice system’s goal of trying cases instead of people. Plain in the PRP is a narrative of
a hardworking fellow undone by a resentful drug addicted welfare mom rejected by her family.

1 The swearing contest envisioned by petitioner bears all the marks of an old fashion trial by oath,
2 where he will advance a defense of compurgation through auxiliary oath takers willing to swear
3 to the truth of his oath despite their ignorance of relevant events.³

- 4 i. The improper opinion testimony about petitioner's
5 trustworthiness from petitioner's best friend, and
6 boss, Towne Collins would have been inadmissible
7 at trial as petitioner's character for honesty was not
8 attacked and was irrelevant to whether he sexually
9 assaulted the victims.

8 Character evidence is generally inadmissible. *State v. Woods*, 117 Wn.App. 278, 280, 70
9 P.3d 976 (2003). Petitioners do not by choosing to testify acquire the right to bolster their
10 credibility through friends called as character witnesses. *United States v. Jackson*, 588 F.2d
11 1046, 1055 (5th Cir. 1979). Reputation evidence based solely on personal opinion is disallowed.
12 *State v. Land*, 121 Wn.2d 494, 500, 851 P.2d 678 (1993). The proponent of reputation evidence
13 must prove a community for which the witness speaks is both neutral and general. *State v. Lord*,
14 117 Wn.2d 829, 874, 822 P.2d 117 (1991). Some relevant factors include frequency, duration or
15 type of contact with the community as well as the community's size. *Land*, 121 Wn.2d at 500.
16 Trial courts have great discretion to decide if a community is neutral or general enough, as well
17 as to reject purported representatives who offer opinions instead of reputation testimony. *See Id.*
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21
22 ³ "Trial by Oath. — As the Anglo-Saxons required from a plaintiff the taking of a fore-oath, so the defendant was
23 allowed sometimes to clear himself merely by his own oath. But the great mediaeval form of trial by oath was
24 where the party swore with the auxiliary oath of others — compurgation. In the Salic Law, that "manual of law and
25 legal procedure for the use of the free judges in the oldest and most nearly universal of the organized Teutonic
courts, the court of the hundred,"¹ in the fifth century, we find it. It continued among the Germanic people in full
force. These fellow-swearers were not witnesses; they swore merely to the truthfulness of another person's oath, or,
as it was refined afterwards, to their belief of its truth. It was not requisite that they should have their own
knowledge of the facts. Although constantly called by the ambiguous name testis, they were not witnesses. They
might be, and perhaps originally should be, the kinsmen of the party." James B. Thayer, *The Older Modes of Trial*,
5 Harv. L. Rev. 45, 57–58 (1891).

1 A major problem with petitioner's presentation of Collins as the overlooked voice of a
2 neutral and general community is one of omission. Petitioner introduces Collins as a law school
3 graduate who employed petitioner as a real estate agent. Strangely, petitioner does not mention
4 Collins as his best friend, as was represented in the presentence report. There petitioner said "he
5 ... has three best friends," among them: Towne Collins. Apx.D at 14. According to petitioner,
6 Collins' son would call him Collins' "best friend." *Id.* That omitted aspect of their relationship
7 would be a reason for counsel to avoid Collins—a witness readily impeachable as biased. That
8 attribute also undermines the claim prejudice resulted from Collin's absence. Most people
9 would assume Collins is petitioner's best friend because Collins, rightly or wrongly, perceives
10 petitioner to be honest. Blind spots are common among friends, which is why admissibility of
11 character evidence turns on the existence of a neutral source.

13 Collins describes agents working for him out of a confederation of 40 offices. Nowhere
14 does he aver they share his opinion of his friend or even had contact enough to form an opinion,
15 much less share a collective conclusion. Referenced work petitioner did for one client adds no
16 basis to infer Collins speaks for anything more than a community of one friendship within the
17 confines of one office sometimes occupied by others. Where a community consists solely of a
18 petitioner's friends it is within a court's discretion to exclude character testimony based on its
19 unrepresentative perspective. *E.g., State v. Alden*, 192 Wn.App. 170, *10 (No. 32695-1-III;
20 2016 WL 901027), *rev. denied*, 186 Wn.2d 1007, 380 P.3d 441 (2012);⁴ citing *State v. Thach*,
21 126 Wn.App. 297, 315, 106 P.3d 782 (2005). It is likewise within counsel's discretion to
22

23
24
25 ⁴ Unpublished opinions of the Court of Appeals have no precedential value and are not binding on any court. However, unpublished opinions of the Court of Appeals filed on or after March 1, 2013, may be cited as nonbinding authorities, if identified as such by the citing party, and may be accorded such persuasive value as the court deems appropriate.

1 strategically avoid such testimony and with it the distracting impeachment sure to descend upon
2 its patently biased source once surrendered to a competent-cross examiner.

3 When there is an alternative to an impeachable witness, professional judgment counsels
4 its pursuit. Another hint of strategic thinking on the part of petitioner's trial counsel lurks
5 elsewhere in petitioner's list of partisans. For another one of his "best friends" is his neighbor
6 Don Satre. Apx.D at 14. Counsel did not call Don,⁵ presumptively choosing instead to call
7 Don's relatively less impeachable wife Janet, who was merely one of petitioner's friends and
8 could at least give a reason why she was capable of impartiality toward K.M., *i.e.*, K.M. cared
9 for her on occasion. Calling Janet to indirectly vouch for petitioner with background testimony
10 while subtly impeaching K.M. by describing her as acting normally the day she was sexually
11 abused was a more clever plan than eliciting like testimony from petitioner's buddies.
12

13 Beyond the weaknesses of Collins as a candidate capable of giving admissible, let alone,
14 persuasive reputation testimony about what a general and neutral business community might
15 say, is the predicate problem of the inadmissibility of such testimony as petitioner's character
16 for truthfulness was never attacked by the State. Under ER 608, good reputation testimony can
17 only be admitted once that attribute is attacked. *Deach*, 40 Wn.App. at 618. Contradiction of a
18 petitioner's testimony that falls short of "slashing cross-examination" does not open the door to
19 good-reputation rebuttal. *Id.*; *State v. Harper*, 35 Wn.App. 855, 860, 670 P.2d 296 (1983). Nor
20 is a door to it opened by close questioning that exposes inconsistencies in a petitioner's version
21 of events. *Id.*; *Jackson*, 588 F.2d at 1055. For even when cross-examination is "slashing," good-
22 reputation rebuttal "may or may not be permitted[.]" *Deach*, 40 Wn.App. at 619.

23 No cross-examination of petitioner could fairly be called "slashing." It took the shape of
24 simple adversarial testing that did not invite bolstering by his friends. Cross-examination began
25

⁵ First names are used to avoid confusion as Don Satre shares a surname with his wife Janet Satre.

1 by eliciting concessions to prove the uncontested age, absence of a marital relationship, and
2 jurisdictional elements of the crimes. 6RP 693-95. An inconsistency was identified in his claim
3 K.M. was obliged to look for work as well as provide uncompensated care to his friend Janet.
4 6RP 695. Photographs petitioner offered of J.J.'s room after she moved out were clarified as
5 capable of depicting the room in a different condition than prevailed when she lived there based
6 on his ability to make changes before the photographs were taken. 6RP 698-99. His ability to
7 take time off from work during the day was conceded. 6RP 701-02. As was his tendency to be
8 "affectionate" with K.M. (hugging and holding her) and that he told her to stop acting like his
9 family. 6RP 702. When confronted with video capturing the conduct, petitioner reversed his
10 averment that he would never rub his niece's butt. 6RP 703-04, 708-16; RP (2/24) 8-9. Far from
11 "slashing," the contradiction was presented as him amending his testimony after having his
12 recollection refreshed. *Id.* Facts about his several-year friendship with Janet were elicited.
13 RP(2/24) 10. Finally, he was confronted with the inconsistency of him stating on direct that he
14 had never been alone with J.J. while conceding on cross it sometimes occurred. *Id.* at 10-11.

16 On re-cross, the State elicited concessions that photographs offered by the defense did
17 not depict J.J.'s room as it was during her occupancy. *Id.* at 14-15. Petitioner acknowledged his
18 physical affection toward K.M. *Id.* He agreed with the proposition he may have been alone with
19 J.J. at times when K.M. was outside smoking. *Id.* at 17. This concession corroborated J.J.'s
20 account of being abused by petitioner when her mother was outside. 4RP 393.

22 There was nothing "slashing" in the State's cross-examination to authorize the proffered
23 testimony about petitioner's supposed reputation for honesty that he now claims counsel was
24 ineffective in failing to adduce. Because good-reputation rebuttal could not have been properly
25 admitted if offered, neither error nor prejudice can be found in counsel withholding that type of

1 testimony from Collins or the two mobile home park residents (Bob Powers and Rob Hall) who,
2 like Collins, vouch for petitioner's honesty from supposition about a community's perspective
3 based on opinions about allegedly observed interactions. Careful review of each declaration
4 offered by petitioner's friends and neighbors reveals them to be inadmissible opinions based on
5 inadmissible specific instances of conduct. Foundation for reputation testimony is missing.

6 Proof of actual-substantial prejudice is further from petitioner's reach, for the fact his
7 friends and a few fellows from a mobile home park think him honest makes it no less likely he
8 sexually assaulted J.J. and K.M. in the privacy of his home. Although vile, his crimes were not
9 dishonest; which is to say, they honestly conveyed a sexual attraction toward the relatives he
10 victimized. Petitioner may otherwise be honest at his office or in his mobile home park, and yet
11 predictably enough lie to avoid the dreadful punishment and stigma attending conviction for
12 perpetrating acts of incestuous abuse against a little girl and her mother. It is illogical to accept
13 petitioner's contention that jurors who credited testimony about the abuse would have acquitted
14 him if only they heard the high opinions of his honesty held by his best friends and two other
15 men who sometimes interacted with him in a mobile home park. The meritless claim counsel
16 was ineffective for not presenting those witnesses to opine about petitioner's trustworthiness
17 should be dismissed as neither error nor outcome determinative prejudice has been proved.

18
19 ii. It would likewise be a legitimate strategy to refrain
20 from calling the two men who sometimes watched
21 petitioner publicly conduct himself around a mobile
22 home park to opine about his sexual decency in a
case of sexual abuse opportunistically perpetrated
against relatives in the privacy of his home.

23 Evidence of a person's character is generally inadmissible, but a criminal defendant may
24 present evidence of a pertinent character trait. *State v. Woods*, 117 Wn.App. 278, 280, 70 P.3d
25 976 (2003); ER 404(a). Sexual decency can be a character trait pertinent to charges of sexual

1 assault; provided, adequate foundation is laid. *Id.*; *State v. Griswold*, 98 Wn.App. 817, 823, 991
2 P.2d 657 (2000). Yet courts acknowledge public reputations for sexual decency may be at odds
3 with actual character or tendencies toward sexual depravity in private. *Woods*, 117 Wn.App. at
4 280; *Jackson*, 46 Wn.App. at 365. Incestuous misconduct of the kind underlying petitioner's
5 convictions does not normally occur in public. *See Jackson*, 46 Wn.App. at 365. Reputations
6 regarding a character for sexual decency pertinent to petitioner's variety of sexual deviancy is
7 more likely to be based on speculation than observed conduct. *See Id.*

8
9 Short of a notorious allegation or a chance exposure through an undraped window there
10 would be no means for petitioner's predilection for sexually assaulting female relatives to have
11 become publicly known. It is not a trait one openly discusses. People in his mobile home park
12 would not have seen him skulking around leering at female neighbors as he was not the type of
13 predator that prowled public places for unrelated women and children to accost. He was not a
14 flasher who publicly exposed himself. Nor was he a peeping tom liable to be caught lingering
15 outside windows. Had he been tried for committing such public acts of sexual deviancy, there
16 might be some utility to the proffered reputation evidence. As character evidence does not prove
17 a crime or defense, its relevance is limited to enabling jurors to infer from a pertinent trait the
18 probability of a defendant committing the charged act. *Thomas*, 110 Wn.2d at 865.

19
20 But a logical inference about how petitioner conducted himself with his female relatives
21 while alone in his home cannot readily be drawn from his behavior around unrelated females in
22 public spaces as a few members of his mobile home park looked on. For by minimal logical
23 relevance it cannot be said one who does not prey on unrelated females in public is less likely to
24 privately molest related females. The probative value, if any, of a reputation for lack of public
25 deviancy is slight if existent as to whether petitioner abused his nieces in private. Its absence

1 from his trial is therefore not the stuff of which prejudicial deficiency on counsel's part can be
2 made. Particularly given the content of the so called good character evidence proposed.

3 Mobile home park manager Powers would opine about petitioner's reputation in that
4 community for sexual decency because no member of the community complained to him about
5 petitioner. A good reputation cannot be inferred from lack of a bad one, for middle possibilities
6 remain of a community with mixed opinions or no opinions, or no opinions strong enough or
7 founded enough to warrant reporting. Hall opines about petitioner's reputation for sexual
8 decency in the mobile home park based on specific instances of watching some people talk to
9 petitioner when he walks a dog and the anecdotal fact that Hall was comfortable with his
10 daughter's interactions with petitioner. So was K.M. before she woke to his hand on her vagina
11 and she learned he sexually abused her daughter. The proffered testimony reflects private
12 opinions based on an inadmissible lack of reported instances of misconduct in Powers case and
13 inadmissible specific instances of observed conduct in Hall's case. ER 405, 608. Neither reflect
14 awareness of a community's expressed approval of petitioner's moral compass in carnal affairs.
15

16 If admitted, the flimsy foundation of the arguments capable of being advanced from both
17 opinions would have been razed through cross-examination. The notion petitioner was less
18 likely to have sexually assaulted his nieces in private because a mobile home park manager had
19 not heard residents report him for indecency and another resident would entrust him with a
20 daughter based on how people respond to him on dog walks is preposterous. Serial killer and
21 sexual sadist John Wayne Gacy was respected in his community and entrusted to entertain its
22 children while wearing a clown suit, that is, of course, before the corpses of 33 boys turned up
23 in his basement.⁶ Had petitioner's jury been presented the proposed character evidence, it would
24
25

⁶ ER 201; <https://www.crimemuseum.org/crime-library/serial-killers/john-wayne-gacy/>

1 have been instructed to convict him notwithstanding if evidence proved his guilt. *Thomas*, 46
2 Wn.App. at 285. Neither error nor outcome-determinative prejudice has been proven to attend
3 the absence of immaterial personal opinions from a few of petitioner's plainly biased friends.

- 4 c. Petitioner's second-prong attack upon K.M.'s alleged character for
5 sobriety and honesty is as inadmissible as it is unpersuasive in the
6 context of a case where his attraction to her was captured on video
7 and J.J. unequivocally identified him as the man who molested her.

8 Through an assemblage of oaths petitioner launches a bare-knuckle ad hominem attack
9 upon K.M.—the niece whose butt he was caught rubbing on camera. Petitioner is not the first to
10 defend against sexual assault convictions by denigrating the victim. But that strategy has been
11 shunned. Our rape shield law was enacted to end the disgraceful, predominately sexist, practice
12 of putting the victim's life on trial. *E.g.*, *State v. Hudlow*, 99 Wn.2d 1, 10-11, 659 P.2d 514
13 (1983). Although petitioner has not directly called K.M. a woman of ill-repute, he casts her as a
14 reckless party girl prone to tumultuous relationships who often finds herself drug addled among
15 strange men. It would be understandable why counsel may have refrained from the strategy of
16 parading a few partisans without personal knowledge of essential facts before the jury to swear
17 that K.M. is a bad girl and petitioner is good man

18 In this context of K.M.'s alleged party-girl lifestyle petitioner and his sister (K.M.'s
19 absentee mother Kay Midgette) find *a clue*; an opportunity for an unknown other suspect to
20 have committed the sex offenses J.J. blamed on petitioner. Odd, because she unequivocally
21 identified him as the man who did "something real bad," who "touched [her] in the wrong
22 places," "girl places." 4RP 387. The uncle who "peed on her." 3RP 352. The uncle who touched
23 her with his "long thing." 3RP 354-55. The uncle who told her he would take her mommy away
24 if she told anyone or complained about pain in her privates. 3RP 294; 4RP 393. Yet according
25 to him, his uninformed friends and sister, K.M. is the villain.

1
2 i. Petitioner wrongly calls counsel incompetent for not
3 pressing admission of K.M.'s drug use.

4 It is well settled evidence of drug use is only admissible to impeach credibility if there is
5 a showing the witness "was using or was influenced at the time of the occurrence which is the
6 subject of the testimony." *State v. Thomas*, 150 Wn.2d 821, 864, 83 P.3d 970 (2004); *State v.*
7 *Russell*, 125 Wn.2d 24, 83, 882 P.2d 747 (1994). Evidence of drug use on other occasions, or of
8 drug addiction, is generally inadmissible on the ground that it is impermissibly prejudicial. *State*
9 *v. Tigano*, 63 Wn.App. 336, 345, 818 P.2d 1369 (1991) (citing *State v. Renneberg*, 83 Wn.2d
10 735, 737, 522 P.2d 835 (1974)).

11 Petitioner proposes calling one of his three best friends, Don, to say K.M. often smelled
12 of marijuana, but petitioner always seemed sober. This opinion would be added to accounts of
13 how K.M. used drugs at times *other than* when she woke to petitioner's hand on her vagina. As
14 in *Tigano*, his affidavits about drugs K.M. allegedly used at times unrelated to his crime raise
15 the impermissible inference she is a drug addict unworthy of belief, especially when compared
16 to a man commended by friends for his commitment to clean living. His theory seems to be
17 K.M. was so drug addled from marijuana or muscle relaxants she hallucinated his indecent
18 liberty. The combined effect is *Defense 2.0*:

19
20 J.J. was likely molested, but confused petitioner for some unidentified man who
21 committed the crime at some party her drug addicted mother brought her to and
22 that same drug addicted mother is so inherently drug addled she also mistakenly
23 came to believe petitioner touched her vagina.

24 When the State moved to exclude K.M.'s drug use at trial, counsel responded:

25 This was one that I had some issues with, ... but I understand the Evidence Rules
and the issues involved. I have talked to my client about how a number of things
are not going to be admissible. We are not objecting to motion 6.

2RP 201-02. An affidavit from counsel regarding that confidential conversation has not been

1 adduced, leaving another fact critical to evaluating his performance beyond the record petitioner
2 was burdened to perfect with his opening brief. Counsel correctly assessed the inadmissibility of
3 K.M.'s alleged drug use, the exclusion of which caused no actual prejudice to petitioner's case.
4

5 ii. Nothing petitioner's best friend has to say about the
6 regularity of petitioner's work schedule is much at
7 odds with how it was described at trial, making it
8 cumulative; nor could it disprove the descriptions of
9 petitioner's crimes, making it mostly irrelevant.

10 Impeachment by contradiction is rebuttal evidence. *State v. Hubbard*, 103 Wn.2d 570,
11 576, 693 P.2d 718 (1985). It falls within no exception to the hearsay rule. *Id.* To be admissible,
12 such extrinsic evidence must be independently competent and admissible for a purpose other
13 than attacking a witness's credibility. *Id.* Such evidence may nonetheless be excluded when it
14 is cumulative. See *State v. Crenshaw*, 27 Wn.App. 326, 332, 617 P.2d 1041 (1980); ER 403.

15 Petitioner claims that if he had been called, his best friend and boss Collins would have
16 contradicted K.M. regarding how regularly petitioner worked. Collins says he saw petitioner at
17 the office "almost every day of the week," without stating precisely when that was or how long
18 petitioner was there. Collins concedes petitioner's job showing properties sometimes took him
19 away from the office as did rides he gave K.M. to appointments. K.M. consistently described
20 petitioner as leaving for a real estate office or landscaping jobs sometimes earlier or later than
21 10:00 a.m. Unlike Collins, who seems to use "regular hours" to mean an uninterrupted period of
22 employment, K.M. used the phrase to explain petitioner was not required to go to "the same
23 office 9:00 to 5:00, Monday to Friday." 6RP 474. According to her, [h]is hours were not set."
24 4RP 404. This is how petitioner consistently described his patently irregular schedule:

25 At that time I was still a real estate agent so I had those duties in conjunction. I
 was also the property manager of three different apartment complexes Well,

1 the 1st through the 5th was very busy for me. That's collecting rents for three
2 different apartment complexes. We did not – we had one drop box on one
3 property, so normally I would have to be going around to the different properties,
4 collecting rents. And that, and normally I would start around 10:00, and a lot of
5 times get home at 5:00, 6:00, 7:00 at night.

6 From the 6th on, for about five or six days, it was notices, pay or vacate, notices to
7 the residents, trying to collect the rents, occasionally having to go to where they
8 were to collect it because the owner wanted the money.... It worked out like that,
9 plus quite a lot of evenings I was doing all the handyman work ... Our data
10 business system was actually at my real estate office in Lakewood. I was normally
11 there 10:00 or 11:00 in the morning almost Monday through Friday

12 6RP 674-76. Subtle semantic shifts and immaterial details differentiate the three accounts of
13 petitioner's schedule. No point of difference narrows a window of opportunity for him to have
14 committed a crime of conviction. Petitioner committed indecent liberties by touching K.M.'s
15 vagina in the middle of the night without her consent. J.J. said he raped and molested her when
16 her mom was outside or sleeping. 4RP 393; (2/24) 10-1. Those acts, which may happen in
17 seconds, could have occurred any time before 10:00 or 11:00 a.m. when he left for work and
18 after 5:00 p.m. or 7:00 p.m. when he returned home. There is consequently no deficiency or
19 prejudice attending the absence of petitioner's best friend Collins from the defense witness list.

20 iii. An ineffective assistance claim cannot be supported
21 by a claim counsel should have pursued extrinsic
22 evidence of collateral matters for use in legitimately
23 avoided impeachment.

24 The extent of cross-examination is strategic. *State v. Johnston*, 143 Wn.App. 1, 20, 177
25 P.3d 1127 (2007). Claims counsel could have done a better job at it typically cannot prove
deficient performance. *Id.* Counsel can strategically refrain from impeaching witnesses with
minor misconduct to avoid alienating jurors. *E.g.*, *State v. Cushman*, (Unpublished No. 75739-
3-I) (2018 WL 3120825; GR 14.1 (persuasive not precedent). To establish prejudice for a
missed opportunity during cross-examination, a petitioner must show foregone testimony could

1 have overcome evidence against the petitioner. *Id.*; *State v. Lewis*, 156 Wn.App. 230, 243, 233
2 P.3d 891 (2010) (not ineffective to withhold objection to exclusion of victim’s drug conviction
3 from robbery trial where victim denied using drugs defendant attributed to their contact).

4 Petitioner says counsel was ineffective for failing to acquire paperwork from Walmart
5 documenting a shoplift K.M. admitted and Walmart was content resolving by way of a civil
6 compromise letter. But such paperwork, if existent, could not have been admitted at petitioner’s
7 trial as extrinsic evidence of collateral matters may not be admitted for impeachment. *State v.*
8 *Fisher*, 165 Wn.2d 727, 750–51, 202 P.3d 937 (2009); *State v. Carlson*, 61 Wn.App. 865, 876,
9 812 P.2d 536 (1991); ER 608. If K.M. denied involvement once confronted with her admission,
10 the inquiry would have been at an end; for “the cross-examiner must take the answer[.]” *State v.*
11 *Barnes*, 54 Wn.App. 536, 540, 774 P.2d 547 (1989). So petitioner’s claim counsel “could have
12 more authoritatively confronted K.M.” is wrong. The same is true of a reported accusation that
13 K.M. took a roommate’s medication without permission. No way would a rational trial court
14 permit petitioner’s case to devolve into a mini-trial on that unrelated- unproven claim. No more
15 can be said about the inadmissible private opinions of K.M.’s absentee mother about K.M.’s
16 veracity or who was to blame for their unrelated falling out. ER 608(b) prohibits mini-trials on
17 collateral matters like the three petitioner presents. ER 403; *Palmer v. City of Monticello*, 31
18 F.3d 1499, n.11 (10th Cir. 1994).

19
20 Professional counsel could decide not to defend against child rape and indecent liberties
21 by beating an indigent single mother over the head with the fact she shoplifted from a big-box
22 store that perceived the incident insignificant or doubtful enough to settle with a letter. There is
23 no rule counsel could have invoked to persuade a rule-minded court to permit a mini-trial about
24 whether K.M. took medication from a roommate or was the aggressor in a domestic dispute
25

1 with her absentee mother. One need only picture the pitch being made to the trial court, or the
2 inquiry unfold, to appreciate why both would be avoided by competent counsel.

3 Throughout the collateral attack petitioner presents this case as one of his word against
4 that of K.M. But it is not so. He admitted to unnatural affection toward K.M. Although claiming
5 he did not touch her vagina, he said he held her, touched her lower back, and (after confronted
6 with the video of it) rubbed her butt. It is a case in which *Ryan* compliant statements made to
7 several witnesses combined with J.J.'s testimony to prove all of the horrible things he did to a
8 little girl he implausibly claimed never to be alone with until cross-examination. Nothing his
9 best friends, a few men from his mobile home park or his absentee sister have said discredits the
10 evidence petitioner's jury credited when it convicted petitioner as charged.

11
12 D. CONCLUSION

13 The retrial by oath he seeks is rightly disallowed. Competent counsel could have easily
14 avoided petitioner's proposed approach of using partisans to portray him as a good man, K.M.
15 as a bad girl and J.J. as a confused child. Most of petitioner's offerings are either inadmissible
16 or incapable of being used in the way or to the extent proposed. The remainder is flawed enough
17 for counsel to forego in favor of a more foreseeably successful approach. All the fault petitioner
18 finds in counsel exists in the unreviewable realm of strategy. There is no actual prejudice in
19 anything counsel left undone. Petitioner's meritless petition should be dismissed.

20 RESPECTFULLY SUBMITTED: September 21, 2018.

21
22 MARK LINDQUIST
Pierce County Prosecuting Attorney

23 

24 JASON RUYF
Deputy Prosecuting Attorney
25 WSB #38725

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Certificate of Service:

The undersigned certifies that on this day she delivered by U.S. mail to petitioner true and correct copies of the document to which this certificate is attached. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington, on the date below.

9.21.12 
Date Signature

APPENDIX "A"



14-1-00309-1 44506136 JDSWCD 04-20-15

DEPT. 5
IN OPEN COURT

APR 17 2015

Pierce County Clerk
By *[Signature]*
DEPUTY

SUPERIOR COURT OF WASHINGTON FOR PIERCE COUNTY

STATE OF WASHINGTON,

Plaintiff,

CAUSE NO: 14-1-00309-1

vs.

DARREL LORNE HARRIS,

Defendant.

WARRANT OF COMMITMENT

1) County Jail

2) Dept. of Corrections

3) Other Custody

APR 20 2015

THE STATE OF WASHINGTON TO THE DIRECTOR OF ADULT DETENTION OF PIERCE COUNTY:

WHEREAS, Judgment has been pronounced against the defendant in the Superior Court of the State of Washington for the County of Pierce, that the defendant be punished as specified in the Judgment and Sentence/Order Modifying/Revoking Probation/Community Supervision, a full and correct copy of which is attached hereto.

[] 1. YOU, THE DIRECTOR, ARE COMMANDED to receive the defendant for classification, confinement and placement as ordered in the Judgment and Sentence. (Sentence of confinement in Pierce County Jail).

2. YOU, THE DIRECTOR, ARE COMMANDED to take and deliver the defendant to the proper officers of the Department of Corrections; and

YOU, THE PROPER OFFICERS OF THE DEPARTMENT OF CORRECTIONS, ARE COMMANDED to receive the defendant for classification, confinement and placement as ordered in the Judgment and Sentence. (Sentence of confinement in Department of Corrections custody).

WARRANT OF
COMMITMENT -1

Office of Prosecuting Attorney
930 Tacoma Avenue S. Room 946
Tacoma, Washington 98402-2171
Telephone: (253) 798-7400

4/20/2015 10:01:59 AM 77

[] 3. YOU, THE DIRECTOR, ARE COMMANDED to receive the defendant for classification, confinement and placement as ordered in the Judgment and Sentence. (Sentence of confinement or placement not covered by Sections 1 and 2 above).

Dated: 4-17-15

By direction of the Honorable
[Signature]
JUDGE
KEVIN STOCK
CLERK

[Signature]
DEPUTY CLERK



CERTIFIED COPY DELIVERED TO SHERIFF
APR 20 2015 [Signature] Deputy

DEPT. 5
IN OPEN COURT
APR 17 2015
Pierce County Clerk
By [Signature] Deputy

STATE OF WASHINGTON

ss:

County of Pierce

I, Kevin Stock, Clerk of the above entitled Court, do hereby certify that this foregoing instrument is a true and correct copy of the original now on file in my office.

IN WITNESS WHEREOF, I hereunto set my hand and the Seal of Said Court this _____ day of _____,

KEVIN STOCK, Clerk

By: _____ Deputy

mrp

SUPERIOR COURT OF WASHINGTON FOR PIERCE COUNTY

DEPT. 5
 IN OPEN COURT
 APR 17 2015
 Pierce County Clerk
 By *[Signature]*
 DEPUTY

STATE OF WASHINGTON,

Plaintiff, CAUSE NO. 14-1-00309-1

vs.

JUDGMENT AND SENTENCE (JS)

APR 20 2015

DARREL LORNE HARRIS

Defendant.

- Prison
- RCW 9.94A.712(9), 9.94A.507 Prison Confinement
- Jail One Year or Less
- First-Time Offender
- Special Sexual Offender Sentencing Alternative
- Special Drug Offender Sentencing Alternative
- Alternative to Confinement (ATC)
- Clerk's Action Required, para 4.5 (SDOSA), 4.7 and 4.8 (SSOSA) 4.15.2, 5.3, 5.6 and 5.8
- Juvenile Decline Mandatory Discretionary

SID: 14516626
 DOB: 03/05/1966

I HEARING

1.1 A sentencing hearing was held and the defendant, the defendant's lawyer and the (deputy) prosecuting attorney were present.

II FINDINGS

There being no reason why judgment should not be pronounced, the court FINDS:

2.1 CURRENT OFFENSE(S): The defendant was found guilty on 02/25/15 by plea jury-verdict bench trial of:

COUNT	CRIME	RCW	ENHANCEMENT TYPE*	DATE OF CRIME	INCIDENT NO.
I	RAPE OF A CHILD IN THE FIRST DEGREE (136)	9A.44.073	NONE	10/13/13 - 11/09/13	133130513 PCSO
II	CHILD MOLESTATION IN THE FIRST DEGREE (139)	9A.44.083	NONE	10/13/13 - 11/09/13	133130513 PCSO
III	INDECENT LIBERTIES/DV (114/DV)	9A.44.100(1)(b) & 10.99.020	NONE	11/05/13 - 11/06/13	133130513 PCSO

JUDGMENT AND SENTENCE (JS)
 (Felony) (7/2007) Page 1 of 12

15-9-03633-6

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* (F) Firearm, (D) Other deadly weapons, (V) VUCSA in a protected zone, (VH) Veh. Harm, See RCW 46.61.520,
(JP) Juvenile present, (SM) Sexual Motivation, (SCF) Sexual Conduct with a Child for a Fee. See RCW
9.94A.533(8). (If the crime is a drug offense, include the type of drug in the second column.)

as charged in the AMENDED Information *state has pled + proven Count III involves domestic violence*

- Current offenses encompassing the same criminal conduct and counting as one crime in determining the offender score are (RCW 9.94A.589):
- Other current convictions listed under different cause numbers used in calculating the offender score are (list offense and cause number):

2.2 CRIMINAL HISTORY (RCW 9.94A.525):

NONE KNOWN OR CLAIMED

2.3 SENTENCING DATA:

COUNT NO.	OFFENDER SCORE	SERIOUSNESS LEVEL	STANDARD RANGE (not including enhancements)	PLUS ENHANCEMENTS	TOTAL STANDARD RANGE (including enhancements)	MAXIMUM TERM
I	6	XII	162 - 216 MOS		162 - 216 MOS	LIFE/ \$50,000
II	6	X	98 - 130 MOS		98 - 130 MOS	LIFE/ \$10,000
III	6	VII	57 - 75 MOS		57 - 75 MOS	10 YRS/ \$20,000

2.4 EXCEPTIONAL SENTENCE. Substantial and compelling reasons exist which justify an exceptional sentence:

- within below the standard range for Count(s) _____.
- above the standard range for Count(s) _____.

The defendant and state stipulate that justice is best served by imposition of the exceptional sentence above the standard range and the court finds the exceptional sentence furthers and is consistent with the interests of justice and the purposes of the sentencing reform act.

Aggravating factors were stipulated by the defendant, found by the court after the defendant waived jury trial, found by jury by special interrogatory.

Findings of fact and conclusions of law are attached in Appendix 2.4. Jury's special interrogatory is attached. The Prosecuting Attorney did did not recommend a similar sentence.

2.5 ABILITY TO PAY LEGAL FINANCIAL OBLIGATIONS. The court has considered the total amount owing, the defendant's past, present and future ability to pay legal financial obligations, including the defendant's financial resources and the likelihood that the defendant's status will change. The court finds that the defendant has the ability or likely future ability to pay the legal financial obligations imposed herein. RCW 9.94A.753.

The following extraordinary circumstances exist that make restitution inappropriate (RCW 9.94A.753):

The following extraordinary circumstances exist that make payment of nonmandatory legal financial obligations inappropriate:

2.6 **FELONY FIREARM OFFENDER REGISTRATION.** The defendant committed a felony firearm offense as defined in RCW 9A.10.010.

The court considered the following factors:

the defendant's criminal history.

whether the defendant has previously been found not guilty by reason of insanity of any offense in this state or elsewhere.

evidence of the defendant's propensity for violence that would likely endanger persons.

other: _____

The court decided the defendant should should not register as a felony firearm offender.

III. JUDGMENT

3.1 The defendant is **GUILTY** of the Counts and Charges listed in Paragraph 2.1.

3.2 The court **DISMISSES** Counts _____ The defendant is found **NOT GUILTY** of Counts _____

IV. SENTENCE AND ORDER

IT IS ORDERED:

4.1 Defendant shall pay to the Clerk of this Court: (Pierce County Clerk, 930 Tacoma Ave #110, Tacoma WA 98402)

JASS CODE

RTNRJN	\$ <u>368.90</u>	Restitution to:	<u>First Recovery Group</u>
	\$ <u>82.45</u>	Restitution to:	<u>" " "</u>
	(Name and Address--address may be withheld and provided confidentially to Clerk's Office).		
PCV	\$ <u>500.00</u>	Crime Victim assessment	
DNA	\$ <u>100.00</u>	DNA Database Fee	
PUB	\$ _____	Court-Appointed Attorney Fees and Defense Costs	
FRC	\$ <u>200.00</u>	Criminal Filing Fee	
FCM	\$ _____	Fine	

OTHER LEGAL FINANCIAL OBLIGATIONS (specify below)

\$ _____ Other Costs for: _____

\$ _____ Other Costs for: _____

\$1,251.35 TOTAL

The above total does not include all restitution which may be set by later order of the court. An agreed restitution order may be entered. RCW 9.94A.753. A restitution hearing:

shall be set by the prosecutor.

is scheduled for _____

RESTITUTION. Order Attached

agreed

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[] The Department of Corrections (DOC) or clerk of the court shall immediately issue a Notice of Payroll Deduction. RCW 9.94A.7602, RCW 9.94A.760(8).

[X] All payments shall be made in accordance with the policies of the clerk, commencing immediately, unless the court specifically sets forth the rate herein: Not less than \$ per CCO per month commencing per CCO. RCW 9.94.760. If the court does not set the rate herein, the defendant shall report to the clerk's office within 24 hours of the entry of the judgment and sentence to set up a payment plan.

The defendant shall report to the clerk of the court or as directed by the clerk of the court to provide financial and other information as requested. RCW 9.94A.760(7)(b)

[] COSTS OF INCARCERATION. In addition to other costs imposed herein, the court finds that the defendant has or is likely to have the means to pay the costs of incarceration, and the defendant is ordered to pay such costs at the statutory rate. RCW 10.01.160.

COLLECTION COSTS The defendant shall pay the costs of services to collect unpaid legal financial obligations per contract or statute. RCW 36.18.190, 9.94A.780 and 19.16.500.

INTEREST The financial obligations imposed in this judgment shall bear interest from the date of the judgment until payment in full, at the rate applicable to civil judgments. RCW 10.82.090

COSTS ON APPEAL An award of costs on appeal against the defendant may be added to the total legal financial obligations. RCW. 10.73.160.

4.1b ELECTRONIC MONITORING REIMBURSEMENT. The defendant is ordered to reimburse _____ (name of electronic monitoring agency) at _____ for the cost of pretrial electronic monitoring in the amount of \$ _____.

4.2 [X] DNA TESTING. The defendant shall have a blood/biological sample drawn for purposes of DNA identification analysis and the defendant shall fully cooperate in the testing. The appropriate agency, the county or DOC, shall be responsible for obtaining the sample prior to the defendant's release from confinement. RCW 43.43.754.

[X] HIV TESTING. The Health Department or designee shall test and counsel the defendant for HIV as soon as possible and the defendant shall fully cooperate in the testing. RCW 70.24.340.

4.3 NO CONTACT

The defendant shall not have contact with J.J. [unclear], K.M. 5/7/88 (name, DOB) including, but not limited to, personal, verbal, telephonic, written or contact through a third party for Life years (not to exceed the maximum statutory sentence).

[X] Domestic Violence No-Contact Order, Antiharassment No-Contact Order, or Sexual Assault Protection Order is filed with this Judgment and Sentence.

4.4 OTHER: Property may have been taken into custody in conjunction with this case. Property may be returned to the rightful owner. Any claim for return of such property must be made within 90 days. After 90 days, if you do not make a claim, property may be disposed of according to law.

• Psycho-social eval + follow-up treatment
• No contact with minors
• Register as a sex offender as required by law
• Appendix E+H
• Law abiding behavior
• Conditions per CCO

4.4a All property is hereby forfeited

Property may have been taken into custody in conjunction with this case. Property may be returned to the rightful owner. Any claim for return of such property must be made within 90 days. After 90 days, if you do not make a claim, property may be disposed of according to law.

4.4b BOND IS HEREBY EXONERATED

4.5 CONFINEMENT OVER ONE YEAR. The defendant is sentenced as follows:

(a) CONFINEMENT. RCW 9.94A.589. Defendant is sentenced to the following term of total confinement in the custody of the Department of Corrections (DOC):

_____ months on Count	<u>I</u>	_____ months on Count	_____
_____ months on Count	<u>II</u>	_____ months on Count	_____
_____ months on Count	<u>III</u>	<u>75</u> months on Count	<u>III</u>

CONFINEMENT. RCW 9.94A.712. Defendant is sentenced to the following term of confinement in the custody of the Department of Corrections (DOC):

Count <u>I</u>	Minimum Term: <u>162</u>	Months	Maximum Term: <u>Life</u>
Count <u>II</u>	Minimum Term: <u>130</u>	Months	Maximum Term: <u>Life</u>
Count <u>III</u>	Minimum Term: _____	Months	Maximum Term: <u>Life</u>

****** The Indeterminate Sentencing Review Board may increase the minimum term of confinement. ******

Actual number of months of total confinement ordered is: 162 months

(Add mandatory firearm, deadly weapons, and sexual motivation enhancement time to run consecutively to other counts, see Section 2.3, Sentencing Data, above).

The confinement time on Count(s) _____ contain(s) a mandatory minimum term of _____

CONSECUTIVE/CONCURRENT SENTENCES. RCW 9.94A.589. All counts shall be served concurrently, except for the portion of those counts for which there is a special finding of a firearm, other deadly weapon, sexual motivation, VUCSA in a protected zone, or manufacture of methamphetamine with juvenile present as set forth above at Section 2.3, and except for the following counts which shall be served consecutively: _____

The sentence herein shall run consecutively to all felony sentences in other cause numbers imposed prior to the commission of the crime(s) being sentenced. The sentence herein shall run concurrently with felony sentences in other cause numbers imposed after the commission of the crime(s) being sentenced except for the following cause numbers. RCW 9.94A.589: _____

Confinement shall commence immediately unless otherwise set forth here: _____

(c) The defendant shall receive credit for time served prior to sentencing if that confinement was solely under this cause number. RCW 9.94A.505. The time served shall be computed by the jail unless the credit for time served prior to sentencing is specifically set forth by the court. To be calculated by DOC

4.6 [] COMMUNITY PLACEMENT (pre 7/1/00 offenses) is ordered as follows:

Count _____ for _____ months;

Count _____ for _____ months;

Count _____ for _____ months;

COMMUNITY CUSTODY (To determine which offenses are eligible for or required for community custody see RCW 9.94A.701)

The defendant shall be on community custody for:

Count(s) III 36 months for ^{Sex} ~~Serious Violent Offenses~~

Count(s) _____ 18 months for Violent Offenses

Count(s) _____ 12 months (for crimes against a person, drug offenses, or offenses involving the unlawful possession of a firearm by a street gang member or associate)

Note: combined term of confinement and community custody for any particular offense cannot exceed the statutory maximum. RCW 9.94A.701.

COMMUNITY CUSTODY is Ordered for counts sentenced under RCW 9.94A.712, from time of release from total confinement until the expiration of the maximum sentence:

Count I until _____ ~~years from today's date~~ for the remainder of the Defendant's life.

Count II until _____ ~~years from today's date~~ for the remainder of the Defendant's life.

~~Count III until _____ ~~years from today's date~~ for the remainder of the Defendant's life.~~

(B) While on community placement or community custody, the defendant shall: (1) report to and be available for contact with the assigned community corrections officer as directed; (2) work at DOC-approved education, employment and/or community restitution (service); (3) notify DOC of any change in defendant's address or employment; (4) not consume controlled substances except pursuant to lawfully issued prescriptions; (5) not unlawfully possess controlled substances while in community custody; (6) not own, use, or possess firearms or ammunition; (7) pay supervision fees as determined by DOC; (8) perform affirmative acts as required by DOC to confirm compliance with the orders of the court; (9) abide by any additional conditions imposed by DOC under RCW 9.94A.704 and .706 and (10) for sex offenses, submit to electronic monitoring if imposed by DOC. The defendant's residence location and living arrangements are subject to the prior approval of DOC while in community placement or community custody. Community custody for sex offenders not sentenced under RCW 9.94A.712 may be extended for up to the statutory maximum term of the sentence. Violation of community custody imposed for a sex offense may result in additional confinement.

The court orders that during the period of supervision the defendant shall:

[] consume no alcohol.

have no contact with: minors, J.J., K.M.

remain within outside of a specified geographical boundary, to wit: per CCO

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not serve in any paid or volunteer capacity where he or she has control or supervision of minors under 13 years of age

participate in the following crime-related treatment or counseling services: per CCO,
psycho-sex evaluation + treatment

undergo an evaluation for treatment for domestic violence substance abuse
 mental health anger management and fully comply with all recommended treatment.

comply with the following crime-related prohibitions: no contact with minors,
any per CCO

Other conditions:
Register as a sex offender per statute, Appendix F+H,
conditions per CCO, law abiding behavior

For sentences imposed under RCW 9.94A.702, other conditions, including electronic monitoring, may be imposed during community custody by the Indeterminate Sentence Review Board, or in an emergency by DOC. Emergency conditions imposed by DOC shall not remain in effect longer than seven working days.

Court Ordered Treatment: If any court orders mental health or chemical dependency treatment, the defendant must notify DOC and the defendant must release treatment information to DOC for the duration of incarceration and supervision. RCW 9.94A.562.

PROVIDED: That under no circumstances shall the total term of confinement plus the term of community custody actually served exceed the statutory maximum for each offense

4.7 **WORK ETHIC CAMP.** RCW 9.94A.690, RCW 72.09.410. The court finds that the defendant is eligible and is likely to qualify for work ethic camp and the court recommends that the defendant serve the sentence at a work ethic camp. Upon completion of work ethic camp, the defendant shall be released on community custody for any remaining time of total confinement, subject to the conditions below. Violation of the conditions of community custody may result in a return to total confinement for the balance of the defendant's remaining time of total confinement. The conditions of community custody are stated above in Section 4.6.

4.8 **OFF LIMITS ORDER** (known drug trafficker) RCW 10.66.020. The following areas are off limits to the defendant while under the supervision of the County Jail or Department of Corrections: _____

CONFINEMENT. RCW 9.94A.712. Defendant is sentenced to the following term of confinement in the custody of the Department of Corrections (DOC):

Count I Minimum Term: 162 Months Maximum Term: Life
Count II Minimum Term 130 Months Maximum Term: Life
Count III Minimum Term _____ Months Maximum Term: Life

The Indeterminate Sentencing Review Board may increase the minimum term of confinement []
COMMUNITY CUSTODY is Ordered for counts sentenced under RCW 9.94A.712, from time of release
from total confinement until the expiration of the maximum sentence:

Count I until years from today's date for the remainder of the Defendant's life.

Count II until years from today's date for the remainder of the Defendant's life.

~~Count III until years from today's date for the remainder of the Defendant's life.~~

V. NOTICES AND SIGNATURES

5.1 **COLLATERAL ATTACK ON JUDGMENT.** Any petition or motion for collateral attack on this Judgment and Sentence, including but not limited to any personal restraint petition, state habeas corpus petition, motion to vacate judgment, motion to withdraw guilty plea, motion for new trial or motion to arrest judgment, must be filed within one year of the final judgment in this matter, except as provided for in RCW 10.73.100. RCW 10.73.090.

5.2 **LENGTH OF SUPERVISION.** For an offense committed prior to July 1, 2000, the defendant shall remain under the court's jurisdiction and the supervision of the Department of Corrections for a period up to 10 years from the date of sentence or release from confinement, whichever is longer, to assure payment of all legal financial obligations unless the court extends the criminal judgment an additional 10 years. For an offense committed on or after July 1, 2000, the court shall retain jurisdiction over the offender, for the purpose of the offender's compliance with payment of the legal financial obligations, until the obligation is completely satisfied, regardless of the statutory maximum for the crime. RCW 9.94A.760 and RCW 9.94A.505. The clerk of the court is authorized to collect unpaid legal financial obligations at any time the offender remains under the jurisdiction of the court for purposes of his or her legal financial obligations. RCW 9.94A.760(4) and RCW 9.94A.753(4).

5.3 **NOTICE OF INCOME-WITHHOLDING ACTION.** If the court has not ordered an immediate notice of payroll deduction in Section 4.1, you are notified that the Department of Corrections or the clerk of the court may issue a notice of payroll deduction without notice to you if you are more than 30 days past due in monthly payments in an amount equal to or greater than the amount payable for one month. RCW 9.94A.7602. Other income-withholding action under RCW 9.94A may be taken without further notice. RCW 9.94A.760 may be taken without further notice. RCW 9.94A.7606.

5.4 **RESTITUTION HEARING.**
[] Defendant waives any right to be present at any restitution hearing (sign initials): _____

5.5 **CRIMINAL ENFORCEMENT AND CIVIL COLLECTION.** Any violation of this Judgment and Sentence is punishable by up to 60 days of confinement per violation. Per section 2.5 of this document, legal financial obligations are collectible by civil means. RCW 9.94A.634.

5.6 **FIREARMS.** You must immediately surrender any concealed pistol license and you may not own, use or possess any firearm unless your right to do so is restored by a court of record. (The court clerk shall forward a copy of the defendant's driver's license, identicard, or comparable identification to the Department of Licensing along with the date of conviction or commitment.) RCW 9.41.040, 9.41.047.

5.7 **SEX AND KIDNAPPING OFFENDER REGISTRATION.** RCW 9A.44.130, 10.01.200.

1. **General Applicability and Requirements:** Because this crime involves a sex offense or kidnapping offense (e.g., kidnapping in the first degree, kidnapping in the second degree, or unlawful imprisonment as defined in chapter 9A.40 RCW) where the victim is a minor defined in RCW 9A.44.130, you are required to register with the sheriff of the county of the state of Washington where you reside. If you are not a

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resident of Washington but you are a student in Washington or you are employed in Washington or you carry on a vocation in Washington, you must register with the sheriff of the county of your school, place of employment, or vocation. You must register immediately upon being sentenced unless you are in custody, in which case you must register at the time of your release and within three (3) business days from the time of release.

2. Offenders Who Leave the State and Return: If you leave the state following your sentencing or release from custody but later move back to Washington, you must register within three (3) business days after moving to this state. If you are under the jurisdiction of this state's Department of Corrections, you must register within three (3) business days after moving to this state. If you leave this state following your sentencing or release from custody but later while not a resident of Washington you become employed in Washington, carry out a vocation in Washington, or attend school in Washington, you must register within three (3) business days after starting school in this state or becoming employed or carrying out a vocation in this state.

3. Change of Residence Within State and Leaving the State: If you change your residence within a county, you must provide, by certified mail, with return receipt requested or in person signed written notice of your change of residence to the sheriff within three (3) business days of moving. If you change your residence to a new county within this state, you must register with that county sheriff within three (3) business days of moving, and must, within three (3) business days provide, by certified mail, with return receipt requested or in person, signed written notice of the change of address in the new county to the county sheriff with whom you last registered. If you move out of Washington State, you must send written notice within three (3) business days of moving to the county sheriff with whom you last registered in Washington State.

4. Additional Requirements Upon Moving to Another State: If you move to another state, or if you work, carry on a vocation, or attend school in another state you must register a new address, fingerprints, and photograph with the new state within three (3) business days after establishing residence, or after beginning to work, carry on a vocation, or attend school in the new state. You must also send written notice within three (3) days of moving to the new state or to a foreign country to the county sheriff with whom you last registered in Washington State.

5. Notification Requirement When Enrolling in or Employed by a Public or Private Institution of Higher Education or Common School (K-12): If you are a resident of Washington and you are admitted to a public or private institution of higher education, you are required to notify the sheriff of the county of your residence of your intent to attend the institution within three (3) business days prior to arriving at the institution. If you become employed at a public or private institution of higher education, you are required to notify the sheriff for the county of your residence of your employment by the institution within three (3) business days prior to beginning to work at the institution. If your enrollment or employment at a public or private institution of higher education is terminated, you are required to notify the sheriff for the county of your residence of your termination of enrollment or employment within three (3) business days of such termination. If you attend, or plan to attend, a public or private school regulated under Title 28A RCW or chapter 72.40 RCW, you are required to notify the sheriff of the county of your residence of your intent to attend the school. You must notify the sheriff within three (3) business days prior to arriving at the school to attend classes. The sheriff shall promptly notify the principal of the school.

6. Registration by a Person Who Does Not Have a Fixed Residence: Even if you do not have a fixed residence, you are required to register. Registration must occur within three (3) business days of release in the county where you are being supervised if you do not have a residence at the time of your release from custody. Within three (3) business days after losing your fixed residence, you must provide signed written notice to the sheriff of the county where you last registered. If you enter a different county and stay there for more than 24 hours, you will be required to register in the new county within three (3) business days after entering the new county. You must also report weekly in person to the sheriff of the county where you are registered. The weekly report shall be on a day specified by the county sheriff's office, and shall occur during normal business hours. You may be required to provide a list the locations where you have stayed during the last seven days. The lack of a fixed residence is a factor that may be considered in determining an offender's risk level and shall make the offender subject to disclosure of information to the public at large pursuant to RCW 4.24.550.

7. Application for a Name Change: If you apply for a name change, you must submit a copy of the

application to the county sheriff of the county of your residence and to the state patrol not fewer than five days before the entry of an order granting the name change. If you receive an order changing your name, you must submit a copy of the order to the county sheriff of the county of your residence and to the state patrol within three (3) business days of the entry of the order. RCW 9A.44.130(7).

The defendant is a sex offender subject to indeterminate sentencing under RCW 9.94A.712.

5.8 [] The court finds that Count _____ is a felony in the commission of which a motor vehicle was used. The clerk of the court is directed to immediately forward an Abstract of Court Record to the Department of Licensing, which must revoke the defendant's driver's license. RCW 46.20.285.

5.9 If the defendant is or becomes subject to court-ordered mental health or chemical dependency treatment, the defendant must notify DOC and the defendant's treatment information must be shared with DOC for the duration of the defendant's incarceration and supervision. RCW 9.94A.562.

5.10 OTHER: Psycho-sexual eval + follow-up treatment, no contact with minors, register as a sex offender, Appendix F+H conditions per CCO, No contact with J.J. or K.M.

DONE in Open Court and in the presence of the defendant this date: 4/17/15

JUDGE

Print name

Vicki Hoffgc

Kara Sanchez

Deputy Prosecuting Attorney

Print name: Kara Sanchez

WSB # 35522

Mark TREY2

Attorney for Defendant

Print name: Mark TREY2

WSB # 16198

Darrel Harris

Defendant

Print name: Darrel Harris

(Signature)

VOTING RIGHTS STATEMENT: RCW 10.64.140. I acknowledge that my right to vote has been lost due to felony convictions. If I am registered to vote, my voter registration will be cancelled. My right to vote may be restored by: a) A certificate of discharge issued by the sentencing court, RCW 9.94A.637; b) A court order issued by the sentencing court restoring the right, RCW 9.92.066; c) A final order of discharge issued by the indeterminate sentence review board, RCW 9.96.050; or d) A certificate of restoration issued by the governor, RCW 9.96.020. Voting before the right is restored is a class C felony, RCW 92A.84.660.

See Appendix G

Defendant's signature: _____

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IN OPEN COURT
APR 17 2015
Pierce County Clerk
By [Signature]
DEPUTY

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2 **CERTIFICATE OF CLERK**

3 CAUSE NUMBER of this case: 14-1-00309-1

4 I, KEVIN STOCK Clerk of this Court, certify that the foregoing is a full, true and correct copy of the Judgment and
5 Sentence in the above-entitled action now on record in this office.

6 WITNESS my hand and seal of the said Superior Court affixed this date: _____

7 Clerk of said County and State, by: _____, Deputy Clerk

8
9 **IDENTIFICATION OF COURT REPORTER**

10 Angela McDougall
11 Court Reporter

Appendix E

VOTING RIGHTS STATEMENT

RCW 10.64.140: After conviction of a felony, or entry of a plea of guilty to a felony, your right to vote is immediately revoked and any existing voter registration is cancelled. Pursuant to RCW 29A.08.520 after you have completed all periods of incarceration imposed as a sentence, and after all community custody is completed and you are discharged by the Department of Corrections, your voting rights are automatically restored on a provisional basis. You must then reregister to be permitted to vote.

Failure to pay legal financial obligations, or comply with an agreed upon payment plan for those obligations, can result in your provisional voting right being revoked by the court.

Your right to vote may be fully restored by a) A certificate of discharge issued by the sentencing court, RCW 9.9A.637; b) A court order issued by the sentencing court restoring the right, RCW 9.92.066; c) A final order of discharge issued by the indeterminate sentence review board, RCW 9.96.050; or d) A certificate of restoration issued by the governor, RCW 9.96.020. Voting before the right is either provisionally or fully restored is a class C felony, RCW 92A.84.660.

I acknowledge receipt and understanding of this information:

Defendant's signature: David Heard

Dated April 17, 2015

4/21/2015 10:04 AM 000090

APPENDIX "F"

The defendant having been sentenced to the Department of Corrections for a:

- sex offense
- serious violent offense
- assault in the second degree
- any crime where the defendant or an accomplice was armed with a deadly weapon
- any felony under 69.50 and 69.52

The offender shall report to and be available for contact with the assigned community corrections officer as directed:

The offender shall work at Department of Corrections approved education, employment, and/or community service;

The offender shall not consume controlled substances except pursuant to lawfully issued prescriptions:

An offender in community custody shall not unlawfully possess controlled substances;

The offender shall pay community placement fees as determined by DOC:

The residence location and living arrangements are subject to the prior approval of the department of corrections during the period of community placement.

The offender shall submit to affirmative acts necessary to monitor compliance with court orders as required by DOC.

The Court may also order any of the following special conditions:

(I) The offender shall remain within, or outside of, a specified geographical boundary: _____

_____ *per CCO*

(II) The offender shall not have direct or indirect contact with the victim of the crime or a specified class of individuals: J.J., K.M., any minors

(III) The offender shall participate in crime-related treatment or counseling services;

(IV) The offender shall not consume alcohol; _____

(V) The residence location and living arrangements of a sex offender shall be subject to the prior approval of the department of corrections; or

(VI) The offender shall comply with any crime-related prohibitions.

(VII) Other: per CCO

IDENTIFICATION OF DEFENDANT

SID No. 14516626
(If no SID take fingerprint card for State Patrol)

Date of Birth 03/05/1966

FBI No. 227524CDO

Local ID No. UNKNOWN

PCN No. 541148922

Other

Alias name, SSN, DOB:

Race:

Asian/Pacific Islander

Black/African-American

Caucasian

Ethnicity:

Hispanic

Sex:

Male

Native American

Other :

Non-Hispanic

Female

FINGERPRINTS

Left four fingers taken simultaneously



Left Thumb



Right Thumb



Right four fingers taken simultaneously



I attest that I saw the same defendant who appeared in court on this document affix his or her fingerprints and signature thereto. Clerk of the Court, Deputy Clerk, [Signature] Dated: 4/17/15

DEFENDANT'S SIGNATURE: Paul Hars

DEFENDANT'S ADDRESS: In custody

DEPT. 5
IN-OPEN COURT
APR 17 2015
Pierce County Clerk
By [Signature]
CLERK

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State of Washington, County of Pierce ss: I, Kevin Stock, Clerk of the
aforementioned court do hereby certify that this foregoing instrument is
a true and correct copy of the original now on file in my office.
IN WITNESS WHEREOF, I herunto set my hand and the Seal of said
Court this 15 day of August, 2018



Kevin Stock, Pierce County Clerk

By /S/Linda Fowler, Deputy.
Dated: Aug 15, 2018 4:20 PM



Instructions to recipient: If you wish to verify the authenticity of the certified document that was transmitted by the Court, sign on to:

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APPENDIX "B"

June 08 2017 9:11 AM

KEVIN STOCK
COUNTY CLERK
NO: 14-1-00309-1

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON,
Respondent,

v.

DARREL L. HARRIS,
Appellant.

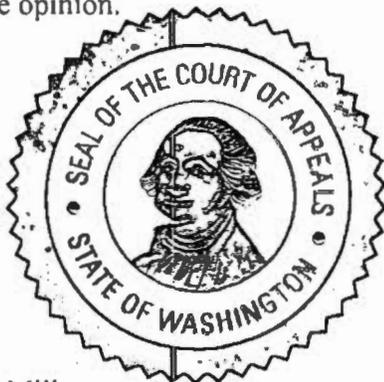
No. 47477-8-II

MANDATE

Pierce County Cause No.
14-1-00309-1

The State of Washington to: The Superior Court of the State of Washington
in and for Pierce County

This is to certify that the opinion of the Court of Appeals of the State of Washington, Division II, filed on February 7, 2017 became the decision terminating review of this court of the above entitled case on May 31, 2017. Accordingly, this cause is mandated to the Superior Court from which the appeal was taken for further proceedings in accordance with the attached true copy of the opinion.



IN TESTIMONY WHEREOF, I have hereunto set
my hand and affixed the seal of said Court at
Tacoma, this 8th day of June, 2017.


Derek M. Byrne
Clerk of the Court of Appeals,
State of Washington, Div. II

Chelsey L Miller
Attorney at Law
930 Tacoma Ave S Rm 946
Tacoma, WA 98402-2102
cmille2@co.pierce.wa.us

James Robert Dixon
Dixon & Cannon, Ltd
601 Union St Ste 3230
Seattle, WA 98101-3949
james@dixoncannon.com

MANDATE
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Page Two

Hon. Vicki Hogan
Pierce Co Superior Court Judge
930 Tacoma Ave So
Tacoma, WA 98402

State of Washington, County of Pierce ss: I, Kevin Stock, Clerk of the
aforementioned court do hereby certify that this foregoing instrument is
a true and correct copy of the original now on file in my office.
IN WITNESS WHEREOF, I herunto set my hand and the Seal of said
Court this 15 day of August, 2018



Kevin Stock, Pierce County Clerk

By /S/Linda Fowler, Deputy.
Dated: Aug 15, 2018 4:20 PM



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APPENDIX "C"

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14-1-00309-1 48591230 CPOP 02-09-17

IN THE SUPERIOR COURT OF WASHINGTON, COUNTY OF PIERCE

FILED
DEPT. 5
IN OPEN COURT
FEB - 7 2017
Pierce County Clerk
By *[Signature]*
DEPT.

STATE OF WASHINGTON,

Plaintiff

vs.

HARRIS, DARREL LORNE,

Defendant

Cause No. 14-1-00309-1

UNPUBLISHED OPINION: WASHINGTON
STATE COURT OF APPEALS, DIVISION II

2/10/2017 15820

February 7, 2017

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON,

Respondent,

v.

DARREL LORNE HARRIS,

Appellant.

No. 47477-8-II

UNPUBLISHED OPINION

LEE, J. — Darrel Lorne Harris appeals his conviction for first degree rape of a child, first degree child molestation, and indecent liberties. Harris argues that (1) the prosecutor committed misconduct by (a) appealing to the passions and prejudices of the jury, (b) misrepresenting the law, and (c) expressing personal opinions on facts not in evidence; (2) defense counsel provided ineffective assistance by not objecting to the prosecutor's comments; (3) the trial court erred by excluding his home surveillance footage and investigator's testimony; (4) the trial court violated his right to be present and the presumption of innocence by ordering him to refrain from emoting; and (5) the cumulative effect of the errors requires reversal. Harris also argues in a statement of additional grounds for review (SAG) that (6) defense counsel was deficient for failing to enter his surveillance footage as evidence; (7) the prosecutor improperly examined him on photographs not in evidence; (8) the trial court erred by denying all of his requests and granting all of the prosecution's; and (9) the trial court erred by excluding his surveillance footage. We affirm.

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FACTS

A. THE INCIDENT

In November 2013, Harris lived with his niece, K.M.,¹ and K.M.'s daughter, J.J.,² at Harris's home. At the time, Harris was 47 years old, K.M. was 25 years old, and J.J. was 5 years old.

On November 6, K.M. awoke to Harris touching her vagina. K.M. moved his hand away. Harris told her that he wanted a relationship with her, but she refused and left the room. Through the rest of the day, Harris drove K.M. to a doctor's appointment, the two had lunch together, and Harris went to work. K.M. hugged Harris before he left for work. But by the time Harris returned home after work, K.M. and J.J. had moved to the home of Theresa Midgette, K.M.'s aunt.

On November 9, K.M. called the police to report the sexual assault. Officer Alex Richards responded and spoke to her. K.M. told Officer Richards about Harris touching her. K.M. said that she did not report it earlier because Harris had threatened to kill her in the past. K.M. also said that Harris had abused J.J. J.J. told Officer Richards that Harris touched her in a "private spot" and that he put "a finger in there." 3 Verbatim Report of Proceedings (VRP) at 279-80.

The next day, K.M. took J.J. to the emergency room to be examined by Dr. Leah Roberts. Dr. Roberts did not find any physical evidence of abuse. However, J.J. did describe what Harris had done to her to Dr. Roberts, forensic interviewer Keri Arnold, pediatric practitioner Michelle Breland, K.M., and Theresa Midgette.

¹ To protect the child's privacy, this opinion uses the mother's initials.

² Pursuant to General Order 2011-1, we use initials for child witnesses in sex crime cases.

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On January 24, 2014, the State charged Harris with one count of indecent liberties for touching K.M. The State also charged Harris with one count of first degree rape of a child and one count of first degree child molestation for abusing J.J.

B. PRETRIAL MOTIONS

Before trial, defense counsel sought to admit Harris's home surveillance footage. The footage contained video clips, including one of the hug between K.M. and Harris before he left for work on November 6, 2013. Harris argued that the footage should be admitted to challenge K.M.'s credibility and show that her actions were inconsistent with someone who had been sexually assaulted earlier that day. The trial court found that the footage was not relevant because it lacked audio and was subject to interpretation, and denied the motion. But the trial court ruled that the witnesses could be examined about the events depicted in the footage.

C. TRIAL

1. Emoting During the State's Case in Chief

Throughout the first half of trial, Harris emoted by nodding and agreeing during witness testimony. The trial court considered these acts as attempts to influence the jury and ordered both parties, but Harris in particular, to refrain from emoting. This was done outside the presence of the jury and defense counsel agreed to discuss this with Harris. However, Harris continued emoting by shaking his head, laughing, and smirking during K.M.'s testimony. As a result, the trial court, outside the presence of the jury, issued a warning and threatened a mistrial if Harris's emoting continued.

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2. State's Evidence

The prosecutor examined Dr. Roberts and Breland about the lack of physical evidence. Dr. Roberts testified that “[i]t is not unusual to see no visual evidence of trauma” in child sexual abuse cases and that “there often is not blatant physical evidence because they are often, the vaginal tissues as well as the rectal tissues . . . are elastic and they don’t often tear or visibly bruise.” 3 VRP at 296-97. This opinion was confirmed by Breland during her testimony, when she testified that “[m]ost of the time when kids have been sexually abused, their bodies are fine” and that “research supports that when kids have been sexually abused, it’s normal for them to not have any physical signs on examination.” 5 VRP at 596, 599.

3. Defense's Evidence

In the defense’s case in chief, defense counsel renewed its motion to admit Harris’s home surveillance footage. The trial court denied the motion citing relevance and authentication concerns. It reasoned that because K.M. did not contradict the footage, it was no longer relevant to impeachment; the defense would still be able to argue their case.

Defense counsel also sought to introduce testimony from an investigator about the layout of Harris’s home. The layout of the house, the existence of doors to Harris’s and J.J.’s rooms, and the ability to close the doors were at issue in the case. Harris was scheduled to testify about the layout of his home. The trial court found that because Harris would be testifying about the layout of the home, the investigator’s testimony would not provide anything Harris could not. The trial court excluded the testimony because it was cumulative, but ruled that the investigator would be allowed to testify about the home if Harris did not do so.

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During the direct examination of Harris, the trial court admitted four photographs into evidence. These photographs depicted different views inside Harris's home: (1) one of his living room and bedroom doorway; (2) one of his doorway in relation to the living room; (3) one from K.M.'s bedroom into J.J.'s; and (4) one from J.J.'s bedroom into K.M.'s. The State then cross-examined Harris about these photographs and others that were taken but not admitted. Two of the photographs not admitted showed J.J.'s bed in relation to the door and the living room as viewed from inside Harris's room.

4. Closing and Rebuttal Arguments

The prosecutor argued during closing that:

Those are [J.J.'s] words. That is her telling adults that are there to help her, what happened to her. Her words. That is enough. Nothing more is required. You will not find anywhere in your instructions that something more is required. That, in addition to a child saying it happened to them, you need corroborating evidence. The law doesn't require it. Her words are enough. They are sufficient evidence for you to convict.

It was talked about in voir dire about this being the situation. It came up that some people might require more, might not just think it would be nice to have more, but actually would require more. As a juror on this case, all of you as jurors on this case, you have taken an oath to follow that law in your instructions. That law does not require more. You took an oath to follow that law.

.....

You have all of those things that you would like to see, but commonly don't see. According to our law, Washington law, it doesn't matter that these things don't exist, in fact rarely exist. So can you imagine a system wherein the majority of cases that are like this one, a child or victim would have to be told, sorry, we can't go forward, we can't prosecute your case because there is nothing to corroborate what you are saying. No one is going to believe a kid with nothing beside your word to prove it. You know, the law requires more. But we don't have that system. Our system doesn't require more.

Testimony, a child's words, a victim's words, are all you need.

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If you believe [J.J.], what she told Ms. Arnold in the forensic interview, which you watched in open court, it was admitted. You'll be able to watch it again if you wish, what she told you from the stand, again what she was able to say, in front of you, a group of strangers, and her abuser, what she told Dr. Roberts, Michelle Breland, her [mother] and auntie, then you are satisfied beyond a reasonable doubt, you have an abiding belief in the truth of the charges. That is being convinced beyond a reasonable doubt.

VRP (Feb. 24, 2015) at 52-54. Harris did not object to the State's closing arguments.

Defense counsel provided a hypothetical during closing arguments and focused on the credibility of K.M. and J.J. and the lack of corroborating evidence.

Now, one of the issues I brought up at the beginning of the trial in voir dire is the subject matter of this type of an allegation. The overwhelming prejudice that society has when this kind of an allegation is made. That prejudice is there really whether or not that allegation is corroborated or uncorroborated. I would submit to you that you read about it in the newspaper or you hear about it, and there is that prejudice that just automatically attaches to that kind of an allegation. In no other situation, I don't think under any other circumstance, would somebody's statement without corroboration be proof positive.

I talked about this analogy in voir dire. You have the contract case where somebody is owed money. There is absolutely no proof. Now, could there be proof? There might be. Could be contracts, work done, something like that. What I am saying is, if there is no proof, there is no proof of work done, no contract, there are no eyewitnesses, somebody says I am owed the money, if that's all the evidence there was, nobody would rule in that person's favor. Yet that is exactly what you are being asked to do in this case. The burden of proof and the presumption of innocence does not change just based on the type of issue we have, whether it is a mundane issue or a very heinous issue. The burden of proof is the same regardless. In fact, I will submit to you that one would even be more careful in the more serious matters. In the instructions, it does say the seriousness of the case can make you more careful or you're allowed to be more careful because of the seriousness of the allegation.

Now, let's take a look at the evidence in this case. Or maybe the lack of evidence in this case. What do we have? We have statements. That is it. There is nothing else. When we have statements and nothing else, it is critical, it is absolutely critical to look at the individual making those statements. You are going

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to have, in society, a far range of people that make accusations. In this case, the accusations flow or come from one person. That is [K.M.].

....

Now, let's look at what we don't have in this case. The prosecutor has touched on this. We don't have anything. Essentially we have nothing. There is nothing establishing that abuse occurred. There is nothing verifying abuse occurred. There is nothing corroborating the statements from [K.M.]. There is no medical evidence. Again, I would submit to you there are cases where there is medical evidence. We have no medical evidence showing any abnormality whatsoever, rashes, bruising, anything. In fact, there were two examinations. They both showed that [J.J.] was a healthy, young five-year-old. There was no signs of her having been raped. No physical evidence. No eyewitness evidence. No admissions or confessions. Nothing.

The prosecutor called a number of witnesses, other than [K.M.] and [J.J.]. In fact, they called a total of six other witnesses other than [K.M.] and [J.J.]. Not one of those witnesses presented any additional evidence of [K.M.] or [J.J.] being abused.

....

There is no evidence in this case. It is a very serious matter. Proof beyond a reasonable doubt is mandatory. [Harris] is not guilty of these allegations. He told you he did not commit these horrible acts. The prosecutor did not prove their case beyond a reasonable doubt. They presented absolutely no evidence of sexual contact outside of the highly dubious testimony of [K.M.]. I am imploring you to return a verdict of not guilty on all three counts in this matter.

VRP (Feb. 24, 2015) at 76-77, 86-88.

In rebuttal, the prosecutor argued:

Again, we don't require—the law does not require corroboration of when a person says, I was raped. The law doesn't require that. We don't want it to. Because then you could prosecute maybe one percent of the crimes. Everyone else, even though they are coming forward and they are saying, this happened to me, we would have to tell them: Too bad. Your words are not enough. Your sworn testimony is not enough.

We don't live in that world. That is not what is required. Testimony is enough. That is evidence.

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.....

Couple of things there. It is not just someone's statement. People come in and they testify. They swear to tell the truth. It isn't just a statement. It is testimony. Again, that is proof. There are cases. Defense counsel says in no other situations, in no other case would this be enough. That's not true. If someone says something happened to them, anything, an assault, theft, they don't have some sort of independent corroborating evidence, it doesn't matter. They are saying it happened. If you believe that person, then you are convinced beyond a reasonable doubt.

.....

What I am telling you is that there almost never is other proof. This is not unusual. Yet, these cases are prosecutable. You can find someone guilty beyond a reasonable doubt because someone is telling you this happened to me. That is what you have here.

.....

[J.J.] told Ms. Arnold what happened to her. Her, in the most detail, because that's Ms. Arnold's job. [J.J.] could not say much here. Don't hold that against her. She's six. This happened to her. The defendant is the one that did it. It came up, it came about, who knows, [J.J.] may have never told.

The defendant also touched [K.M.]. As a mother, she had to ask [J.J.], "Did something also happen to you?" That is when it came out. Don't let the defendant get away with this because it is like so many others where there is no corroborating evidence. It doesn't matter. He did it. Find him guilty.

VRP (Feb. 24, 2015) at 91-92, 97-98. Harris did not object to the State's rebuttal arguments.

5. Verdict

The jury found Harris guilty on all counts charged. Harris appeals.

ANALYSIS

Harris argues that the prosecutor committed misconduct during closing and rebuttal arguments, and alternatively, that defense counsel provided ineffective assistance by not objecting

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to such misconduct; the trial court erred in excluding his surveillance footage and his investigator's testimony; and the trial court violated Harris's constitutional rights by restraining him from emoting. We disagree.

A. PROSECUTORIAL MISCONDUCT

Harris claims that the prosecutor committed misconduct during the State's closing and rebuttal arguments by (1) appealing to the passions and prejudices of the jury; (2) misrepresenting the law; and (3) expressing personal opinions. We agree that the prosecutor committed misconduct by appealing to the passions and prejudices of the jury and expressing personal opinions on facts not in evidence, but the prosecutor did not misrepresent the law and any misconduct was not prejudicial.

1. Legal Principles

To prevail on a claim of prosecutorial misconduct, a defendant must establish that the prosecutor's conduct was improper and prejudicial. *State v. Emery*, 174 Wn.2d 741, 756, 278 P.3d 653 (2012). We must first determine whether the prosecutor's conduct was improper. *Id.* at 759. If the prosecutor's conduct was improper, the question turns to whether the misconduct resulted in prejudice. *Id.* at 760. Prejudice is established by showing a substantial likelihood that such misconduct affected the verdict. *Id.*

Where a defendant does not object at trial, he is deemed to have waived any error unless the prosecutor's misconduct was so flagrant and ill intentioned that an instruction could not have cured any resulting prejudice. *Id.* at 760-61. Under this heightened standard, the defendant must show that "(1) 'no curative instruction would have obviated any prejudicial effect on the jury' and (2) the misconduct resulted in prejudice that 'had a substantial likelihood of affecting the jury

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verdict.” *Id.* at 761 (quoting *State v. Thorgerson*, 172 Wn.2d 438, 455, 258 P.3d 43 (2011)). In making this determination, we “focus less on whether the prosecutor’s misconduct was flagrant or ill intentioned and more on whether the resulting prejudice could have been cured.” *Id.* at 762. To analyze prejudice, we look at the comments in the context of the total argument, the issues in the case, the evidence, and the instructions given to the jury. *State v. Warren*, 165 Wn.2d 17, 28, 195 P.3d 940 (2008). The jury is presumed to follow the trial court’s instructions. *State v. Anderson*, 153 Wn. App. 417, 428, 220 P.3d 1273 (2009), *review denied*, 170 Wn.2d 1002 (2010).

2. Appealing to the Passions and Prejudices of the Jury

Harris first argues that the prosecutor committed misconduct by appealing to the passions and prejudices of the jury. We agree but hold that such misconduct was not prejudicial.

a. Misconduct

Prosecutors commit misconduct when they use arguments designed to arouse the passions or prejudices of the jury. *In re Pers. Restraint of Glasmann*, 175 Wn.2d 696, 704, 286 P.3d 673 (2012). Such arguments create a danger that the jury may convict for reasons other than the evidence. *See State v. Ramos*, 164 Wn. App. 327, 338, 263 P.3d 1268 (2011). “A proper argument stays within the bounds of the evidence and the instructions” given. *State v. Smiley*, 195 Wn. App. 185, 194, 379 P.3d 149 (2016).

In *State v. Thierry*, the prosecutor stated that “if the jury did not believe [the victim’s] testimony, and . . . acquitted [the defendant], ‘then the State may as well just give up prosecuting these cases, and the law might as well say that [t]he word of a child is not enough.’” 190 Wn. App. 680, 691, 360 P.3d 940 (2015) (some alterations in original), *review denied*, 185 Wn.2d 1015 (2016). Defense counsel objected to the statement, but the trial court overruled and allowed the

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prosecutor to proceed; the prosecutor repeated this theme throughout closing and rebuttal arguments. *Id.* at 688, 692. This court concluded that the prosecutor's message improperly appealed to the emotions of the jury by relying on the "threatened impact on other cases, or society in general, rather than on the merits of the State's case." *Id.* at 691. In reaching its conclusion, this court reasoned that the prosecutor's statements meant that the jury needed to convict in order to allow reliance on the testimony of future child sexual abuse victims and to protect future victims of such abuse. *Id.*

Similarly, in *State v. Smiley*, the prosecutor made several statements calling the jurors to imagine a legal system in which corroborating evidence was required and to consider how difficult it would be to hold abusers responsible. 195 Wn. App. at 191. The prosecutor in *Smiley* argued:

That is enough for proof beyond a reasonable doubt. Nothing more is required. . . . There's nothing that says there needs to be corroborating evidence of any kind, some kind of physical evidence, some kind of eyewitness. . . . The law does not require it.

Can you imagine a system where it was required? . . . It's not unusual for kids not to disclose to anyone where it's going to come to the attention of the system until months, sometimes years later. . . .

....

If the system did work that way, kids would have to be told, we're sorry, we can't prosecute your case, we can't hold your abuser responsible because all we have is your word, and that's not enough. No one's going to believe a kid or a teen, and we need something else. We don't do that. That's not how the system works.

If the law required that additional evidence, we couldn't prosecute so many of these cases, the majority of these cases. We couldn't hold the majority of sexual abusers responsible. We couldn't hold [the victim's] abuser responsible. So the law doesn't require it. All you need is someone telling you it happened, and if you believe that person, if you believe [the girl], that's enough, you are satisfied beyond a reasonable doubt of the defendant's guilt.

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Id. The court found that the prosecutor's statements were improper and prejudice resulted. *Id.* at 194-95. The court reasoned that it was "unnecessary to explain why the law is the way it is," and that "[s]uch explanations tend to lead into policy-based arguments that divert the jury from its fact-finding function." *Id.* at 194. However, unlike in *Thierry*, defense counsel in *Smiley* did not object. *Id.* at 195. The court held that if an objection had been made, the trial court could have sustained the objection and instructed the jury to disregard the prosecutor's statements. *Id.* at 196-97. As a result, the court held that because the prejudice was curable, the defendant had waived the issue of the improper argument by failing to object. *Id.* at 197.

The present case is analogous to *Smiley* as the arguments made by the prosecutor here are similar to those made by the prosecutor in *Smiley*. First, just as in *Smiley*, the prosecutor here called the jury to imagine a system in which corroborating evidence was required and how difficult it would be to prosecute cases with a child's testimony alone. The prosecutor here argued:

So can you imagine a system wherein the majority of cases that are like this one, a child or victim would have to be told, sorry, we can't go forward, we can't prosecute your case because there is nothing to corroborate what you are saying[?] . . . But we don't have that system. Our system doesn't require more.

Testimony, a child's words, a victim's words, are all you need.

VRP (Feb. 24, 2015) at 53-54.

The prosecutor then argued that if corroborating evidence was required, the State could only prosecute one percent of such cases because words would not be enough.

Again, we don't require—the law does not require corroboration of when a person says, I was raped. The law doesn't require that. We don't want it to. Because then you could prosecute maybe one percent of the crimes. Everyone else, even though they are coming forward and they are saying, this happened to me, we would have to tell them: Too bad. Your words are not enough. Your sworn testimony is not enough.

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We don't live in that world. That is not what is required. Testimony is enough. That is evidence. . . .

It is not just someone's statement. People come in and they testify. They swear to tell the truth. It isn't just a statement. It is testimony. Again, that is proof. . . . If someone says something happened to them, anything, an assault, theft, they don't have some sort of independent corroborating evidence, it doesn't matter. They are saying it happened. If you believe that person, then you are convinced beyond a reasonable doubt.

VRP (Feb. 24, 2015) at 91-92.

Like *Smiley*, the prosecutor's arguments theorized the inability to prosecute child sexual abuse cases if the legal system required corroborating evidence; such an alternative description of the way the law worked essentially asked the jurors to "align themselves with 'the system' in deciding what the necessary quantum of proof should be from a public policy perspective" and if they did not, then other children would be in danger. 195 Wn. App. at 194-95. The prosecutor's comments were improper because it created the risk that the jury decided to believe J.J.'s testimony for improper reasons. Therefore, we hold that the prosecutor committed misconduct.

b. Prejudice

With a finding of misconduct, the analysis turns to whether Harris was prejudiced. Because Harris did not object, the inquiry is whether a curative instruction would have obviated any prejudicial effect. *Emery*, 174 Wn.2d at 761. Division One has held that such arguments constitute misconduct but can be cured with a proper instruction. *Smiley*, 195 Wn. App. at 197 ("[T]he court could have decisively derailed the argument by sustaining the objection and instructing the jury to disregard the improper comments."). We follow *Smiley* and hold that because an instruction could have cured any resulting prejudice, Harris's failure to object waives this argument on appeal.

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3. Misrepresenting the Law and the Jury's Function

Harris next argues that the prosecutor committed misconduct by misrepresenting the law and the jury's function. We hold that the prosecutor did not misrepresent the law and the jury's function.

A prosecutor commits misconduct by misstating the law. *State v. Allen*, 182 Wn.2d 364, 373, 341 P.3d 268 (2015). Such misstatements have "grave potential to mislead the jury." *State v. Davenport*, 100 Wn.2d 757, 763, 675 P.2d 1213 (1984). But a prosecutor's statements must be considered in context. *State v. Swanson*, 181 Wn. App. 953, 964, 327 P.3d 67 (holding that a prosecutor's conduct is reviewed in the full context, considering the issues, arguments, evidence, and instructions presented and given to the jury), *review denied*, 181 Wn.2d 1024 (2014).

Harris challenges the prosecutor's argument that "the jurors would be violating their oath if they decided that the child's word alone was insufficient to meet the State's burden." Br. of Appellant at 26. Harris's challenge fails because one theme of the prosecutor's closing and rebuttal arguments was that corroborating evidence is not required. In fact, the prosecutor's preceding and following statements further explained that corroborating evidence is not required and that the State is able to meet its burden of proof and satisfy the beyond a reasonable doubt standard without corroborating evidence.

Harris argues that the prosecutor "implored [the jury] to ignore the evidence" when she stated, "Don't let the defendant get away with this because it is like so many others where there is no corroborating evidence. It doesn't matter. He did it. Find him guilty." Br. of Appellant at 26; VRP (Feb. 24, 2015) at 98. However, considering this statement in the context of the prosecutor's entire argument, it is apparent that "it doesn't matter" refers to the provision in RCW 9A.44.020(1),

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which does not preclude a finding of guilt in the absence of corroborating evidence. This statement correctly argued that corroborating evidence was not required to find Harris guilty beyond a reasonable doubt. Thus, we hold that the prosecutor did not misrepresent the law and the jury's function.³

4. Introducing Outside Evidence and Personal Opinion

Harris argues that the prosecutor committed misconduct by introducing outside evidence and expressing personal opinion. We agree but hold that such misconduct was not prejudicial.

a. Misconduct

Courts are concerned about the expression of personal opinions by prosecutors because juries may give special weight to their arguments due to their fact-finding resources. *Glasmann*, 175 Wn.2d at 706. Therefore, it is improper for a prosecutor to express a personal opinion independent of the evidence because juries may believe that prosecutors have insider information that was not shared during trial. *State v. Susan*, 152 Wash. 365, 380, 278 P. 149 (1929). However, if based on the evidence, prosecutors may make reasonable inferences in their arguments. *State v. Dhaliwal*, 150 Wn.2d 559, 579, 79 P.3d 432 (2003). Also, prosecutors are allowed to respond to the arguments made by the defense. *State v. Russell*, 125 Wn.2d 24, 87, 882 P.2d 747 (1994). On review, a prosecutor's statements are considered in context. *Swanson*, 181 Wn. App. at 964.

³ We also note that the trial court instructed the jury: (1) they must "decide the facts in [the] case based upon the evidence presented [to them] during [the] trial," (2) the "lawyers' statements are not evidence. The evidence is the testimony and the exhibits," and (3) that they "are also the sole judges of the value or weight to be given to the testimony of each witness." Clerk's Papers at 85-86. The jury is presumed to have followed such instructions. *Anderson*, 153 Wn. App. at 428.

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Here, the prosecutor's arguments went beyond a reasonable inference based on the evidence. At trial, Dr. Roberts testified that "[i]t is not unusual to see no visual evidence of trauma" in child sexual abuse cases and that "there often is not blatant physical evidence because they are often, the vaginal tissues as well as the rectal tissues . . . are elastic and they don't often tear or visibly bruise." 3 VRP at 296-97. Breland testified that "[m]ost of the time when kids have been sexually abused, their bodies are fine" and that "research supports that when kids have been sexually abused, it's normal for them to not have any physical signs on examination." 5 VRP at 596, 599. From this evidence, during closing arguments, Harris argued that there is no corroborating evidence or medical evidence to show that abuse occurred. In response, the prosecutor argued that "the law does not require corroboration of when a person says, I was raped. The law doesn't require that. We don't want it to. Because then you could prosecute maybe one percent of the crimes" and "[w]hat I am telling you is that there almost never is other proof. This is not unusual. Yet, these cases are prosecutable." VRP (Feb. 24, 2015) at 91, 97. The prosecutor then punctuated her argument by telling the jury to not "let the defendant get away with this because it is like so many others where there is no corroborating evidence. It doesn't matter. He did it. Find him guilty." VRP (Feb. 24, 2015) at 98.

The State argues that these arguments were in response to Harris's argument about the lack of evidence and that they were reasonable inferences based on the testimony provided by Dr. Roberts and Breland. However, the prosecutor's arguments that "then you could prosecute maybe one percent of the crimes," "there almost never is other proof. This is not unusual," and "it is like so many others where there is no corroborating evidence," went beyond what is acceptable as a reasonable inference. By expanding the argument beyond the testimony of Dr. Roberts and

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Breland, and speaking about the ability to prosecute similar crimes, the existence of proof, and what is usual or unusual, the prosecutor improperly interjected her own experiences and personal opinions on facts not in evidence. Therefore, we hold that the prosecutor's comments were improper.

b. Prejudice

Finding the prosecutor's comments were improper, the analysis turns to whether Harris was prejudiced. Because Harris did not object, the inquiry is whether a curative instruction would have obviated any prejudicial effect from the improper comments. *Emery*, 174 Wn.2d at 761.

Here, any resulting prejudice could have been cured by a proper instruction from the trial court to disregard the improper comments.⁴ Accordingly, we hold that Harris's prosecutorial misconduct claims fail.

5. Cumulative Effect of Prosecutorial Misconduct

Harris argues that the cumulative effect of prosecutorial misconduct requires reversal. We disagree.

Under the cumulative error doctrine, a trial court's verdict will be reversed when it appears reasonably probable that the cumulative effect of errors materially affected the outcome, even when no one error alone mandates reversal. *Russell*, 125 Wn.2d at 93. The defendant bears the burden of proving the cumulative effect of the errors is of a sufficient magnitude that retrial is necessary. *In re Pers. Restraint of Lord*, 123 Wn.2d 296, 332, 868 P.2d 835 (1994).

⁴ Again, we note that the trial court instructed the jury that they must decide the facts of the case based on the evidence presented and that the lawyers' statements are not evidence. The jury is presumed to follow the trial court's instructions. *Anderson*, 153 Wn. App. at 428.

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Here, Harris has identified two instances of prosecutorial misconduct. As discussed above, the prosecutor committed misconduct by appealing to the passions and prejudices of the jury and expressing her personal opinion on facts not in evidence; however, such misconduct was not prejudicial. Defense counsel utilized the prosecutor's comments in closing, countered them by presenting his own hypothetical about what happens when there is a lack of corroborating evidence in other situations, and highlighted the effect of uncorroborated allegations in prejudicial circumstances. Harris has not met his burden of proving the cumulative effect of the two errors materially affected the outcome. Therefore, his argument fails.

B. INEFFECTIVE ASSISTANCE OF COUNSEL

Harris also claims that he was prejudiced by ineffective assistance of counsel. In support, he cites defense counsel's failure to object to the prosecutor's improper comments made during closing and rebuttal arguments. We disagree.

1. Legal Principles

We review ineffective assistance of counsel claims de novo. *State v. Sutherby*, 165 Wn.2d 870, 883, 204 P.3d 916 (2009). To establish ineffective assistance of counsel, Harris must show both deficient performance and resulting prejudice. *State v. McFarland*, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995). If Harris fails to establish either prong of the test, we need not inquire further. *State v. Foster*, 140 Wn. App. 266, 273, 166 P.3d 726 (2007).

Deficient performance occurs when counsel's performance falls below an objective standard of reasonableness. *State v. Stenson*, 132 Wn.2d 668, 705, 940 P.2d 1239 (1997). There is a strong presumption of effective assistance, and the defendant bears the burden rebutting that presumption by showing the lack of a legitimate strategic or tactical reason for the challenged

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conduct. *McFarland*, 127 Wn.2d at 336; *State v. McLean*, 178 Wn. App. 236, 247, 313 P.3d 1181 (2013) (“[C]ounsel’s performance is not deficient if it can be characterized as a legitimate trial tactic.”).

Decisions of whether to object are “classic example[s] of trial tactics.” *State v. Madison*, 53 Wn. App. 754, 763, 770 P.2d 662 (1989). We presume that a failure to object is a part of a legitimate trial strategy. *State v. Johnston*, 143 Wn. App. 1, 20, 177 P.3d 1127 (2007). Where a defendant bases his ineffective assistance of counsel claim on counsel’s failure to object, the defendant must rebut this presumption by showing that the objection would likely have succeeded and the result of the proceeding would have been different. *Id.* “The absence of an objection by defense counsel strongly suggests to a court that the argument or event in question did not appear critically prejudicial to an appellant in the context of the trial.” *State v. Edvalds*, 157 Wn. App. 517, 525-26, 237 P.3d 368 (2010). “Only in egregious circumstances, on testimony central to the State’s case, will the failure to object constitute incompetence of counsel justifying reversal.” *Johnston*, 143 Wn. App. at 19 (quoting *Madison*, 53 Wn. App. at 763).

2. Deficient Performance

Harris argues that defense counsel’s failure to object to the prosecutor’s improper statements, discussed in Section A above, constituted deficient performance. We disagree.

In this case, the record shows that defense counsel’s failure to object to the prosecutor’s arguments was reasonable and a part of a legitimate trial strategy. The focus of defense counsel’s closing argument, and entire defense theory, was that the State presented only allegations without any corroborating evidence. In fact, defense counsel posited his own hypothetical to counter the State’s arguments and provided the example of a contracts case—if someone alleged they were

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owed money, but there was no proof, then “nobody would rule in that person’s favor.” VRP (Feb. 24, 2015) at 76-77. This defense originated in voir dire and continued throughout the trial, during which, defense counsel also attacked K.M.’s and J.J.’s credibility, raised questions about their motivations for making such allegations, stressed that the State failed to present any evidence to support the allegations other than K.M.’s and J.J.’s testimony, and highlighted the lack of any corroborating evidence. Utilizing the prosecutor’s arguments to emphasize a counter argument is a basic and legitimate trial strategy. Because Harris is not able to show the lack of a legitimate strategic or tactical reason for defense counsel’s decision to not object, he is unable to overcome the presumption of effective assistance. Therefore, Harris’s ineffective assistance of counsel claim fails.

C. RIGHT TO PRESENT A MEANINGFUL DEFENSE

Harris argues that the trial court violated his right to present a meaningful defense when it excluded (1) his home surveillance footage and (2) his investigator’s testimony. We disagree.

I. Standard of Review

A defendant’s Sixth Amendment right to present a meaningful defense is denied when the defendant is precluded from presenting evidence on highly probative facts. *State v. Jones*, 168 Wn.2d 713, 720-21, 230 P.3d 576 (2010). Such a situation exists when the defendant is not able to testify or otherwise present evidence of facts that are essential to the ultimate issue and equate to the defense’s entire argument. *See id.* at 721.

A dispute as to whether a piece of evidence should have been admitted is reviewed under different standards of review based on the reason for its admission and the effect of its exclusion. *See id.* at 719-720. When the evidence is nonessential to the defense’s case, the appellate court

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reviews for an abuse of discretion because the dispute does not implicate a constitutional right. *See id.* at 721; *State v. Ashley*, 186 Wn.2d 32, 39, 375 P.3d 673 (2016).

Here, Harris sought to introduce his home surveillance footage. The surveillance footage depicted the hug between Harris and K.M. before Harris left for work on November 6, 2013. Harris argues that the footage would have helped impeach K.M.—that she did not exhibit the typical behavior of a person that had been sexually assaulted earlier that day. However, the footage was not essential because the case did not hinge on the hug. Without the footage, defense counsel was still able to examine Harris and K.M. on the events depicted, neither of whom denied what happened. Thus, the footage was not so probative as to deny Harris a defense by its exclusion.

Harris also sought to introduce his investigator’s testimony about the layout of Harris’s home because the existence of doors for Harris’s and J.J.’s rooms, and their ability to close were at issue in the case. But the investigator’s testimony was not essential because defense counsel had already planned to question Harris about the layout of his home and present pictures of the home. Also, the trial court ruled that if Harris did not testify, then the investigator’s testimony would be allowed. Harris testified about the very matters his investigator was proffered to testify about. Thus, the investigator’s testimony was not essential to Harris’s defense.

Harris’s right to present a meaningful defense was not implicated by the exclusion of the surveillance footage or the investigator’s testimony. Therefore, the abuse of discretion standard applies.

A trial court abuses its discretion if its decision is “‘manifestly unreasonable, or exercised on untenable grounds, or for untenable reasons.’” *City of Kennewick v. Day*, 142 Wn.2d 1, 5, 11 P.3d 304 (2000) (alteration in original) (quoting *State v. McDonald*, 138 Wn.2d 680, 696, 981 P.2d

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443 (1999)). The exclusion of evidence lies largely within the discretion of the trial court. *State v. Thomas*, 150 Wn.2d 821, 869, 83 P.3d 970 (2004). And we may affirm a trial court's decision on any ground adequately supported by the record. *State v. Huynh*, 107 Wn. App. 68, 74, 26 P.3d 290 (2001). Ultimately, the appellant bears the burden of proving an abuse of discretion. *Ashley*, 186 Wn.2d at 39.

2. No Abuse of Discretion in Excluding Evidence

Evidence is relevant if it has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." ER 401. Relevant evidence is generally admissible. ER 402. "The threshold to admit relevant evidence is very low. Even minimally relevant evidence is admissible." *State v. Darden*, 145 Wn.2d 612, 621, 41 P.3d 1189 (2002). Yet, relevant evidence "may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." ER 403.

a. Home surveillance footage

Harris argues that the trial court erred when it excluded his home surveillance footage. We disagree.

At trial, Harris testified to the events captured in the surveillance footage, and K.M. did not deny what had happened. Both confirmed that K.M. gave Harris a hug right before he left for work that day. Thus, the footage was cumulative. It was well within the trial court's discretion to exclude cumulative evidence under ER 403. Therefore, we hold that the trial court did not abuse its discretion in excluding Harris's home surveillance footage.

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b. Investigator's testimony

Harris argues that the trial court erred when it excluded his investigator's testimony. We disagree.

While the investigator's testimony about whether J.J.'s bedroom door could close was relevant to Harris's defense, the testimony was duplicative of Harris's testimony. During argument on the admission of the testimony, defense counsel stated that he planned to present pictures detailing the layout of Harris's home and examine Harris and the investigator on the layout. The trial court concluded the investigator's testimony would be cumulative because it would not add anything that the pictures and Harris could not provide, and Harris was in a better position to testify due to his familiarity with his home during the time period in question. Therefore, we hold that the trial court did not abuse its discretion in excluding the investigator's testimony as cumulative.

D. RIGHT TO BE PRESENT AND THE PRESUMPTION OF INNOCENCE

Harris argues that the trial court violated his constitutional right to be present and the presumption of innocence when it ordered him to stop emoting at counsel table. We hold that the trial court did not violate Harris's constitutional right because he was physically present in the courtroom during the entire trial and he was not admonished in front of the jury.

We review constitutional claims de novo. *State v. Irby*, 170 Wn.2d 874, 880, 246 P.3d 796 (2011). Under the Sixth and Fourteenth Amendments of the U.S. Constitution, a criminal defendant has a fundamental right to be present at all "critical stages" of trial. *Id.* Presence means physical presence and the ability to defend in person. WASH. CONST. art. I, § 22; *State v. Maryott*, 6 Wn. App. 96, 102-03, 492 P.2d 239 (1971). With this right flows the right to the "physical indicia of innocence which includes the right of the defendant to be brought before the court with

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the appearance, dignity, and self-respect of a free and innocent man.” *State v. Finch*, 137 Wn.2d 792, 844, 975 P.2d 967 (1999).

At the core of the right to be present rests the principle of fairness, and in that vein, the presumption of innocence cannot be jeopardized. *See Irby*, 170 Wn.2d at 900. When a defendant exhibits disruptive or defiant behavior, the trial court must be given sufficient discretion to handle the situation. *State v. Chapple*, 145 Wn.2d 310, 320, 36 P.3d 1025 (2001).

Here, the trial court’s admonishments were done outside the presence of the jury. Although Harris was admonished to refrain from emoting, the admonitions do not rise to the level of violating any indicia of innocence because they were not seen by the jury and thus, were not inherently prejudicial. The admonitions did not single out Harris as particularly guilty or dangerous. Although the admonishments were emphasized to Harris due to his disruptive behavior, the trial court’s orders to stop emoting were directed at both parties.

Also, the admonitions were a result of Harris’s attempts to influence the jury and disrupt the court. The trial court had discretion to manage the situation and did so by prohibiting both parties, albeit Harris in particular, from emoting. Therefore, we hold that Harris’s right to be present was not violated and there was no danger of destroying the presumption of innocence in the minds of the jury.

E. CUMULATIVE ERROR

Harris argues that even if the alleged errors do not independently warrant reversal, the cumulative effect of the errors does. We disagree.

The cumulative error doctrine applies when more than one error occurred at the trial court level, but none alone warrant reversal. *State v. Hodges*, 118 Wn. App: 668, 673-74, 77 P.3d 375

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(2003). Instead, the combined errors effectively denied the defendant a fair trial. *Id.* Numerous errors, harmless standing alone, can deprive a defendant of a fair trial. *State v. Coe*, 101 Wn.2d 772, 789, 684 P.2d 668 (1984). The defendant bears the burden of proving the cumulative effect of the errors is of a sufficient magnitude that retrial is necessary. *Lord*, 123 Wn.2d at 332.

Here, Harris is not entitled to relief based on cumulative error. Only two instances of nonprejudicial prosecutorial misconduct occurred, and we hold that Harris has not met his burden of showing the cumulative effect of the errors is of sufficient magnitude to require reversal. Therefore, we do not grant relief based on cumulative error.

F. SAG

1. Ineffective Assistance of Counsel

Harris argues that defense counsel was ineffective for failing to introduce his home surveillance footage. However, defense counsel did attempt to introduce Harris's home surveillance footage both before and during trial. Therefore, we hold that this argument fails because it is factually incorrect.

2. Facts Not in Evidence

Harris argues that the prosecutor improperly asked about facts not in evidence when she questioned him about photographs that were not admitted. We disagree.

On direct examination of Harris, to show that J.J.'s bedroom door could not close because of the placement of J.J.'s bed and that Harris's bedroom did not have a door, four photographs were admitted depicting different views from the inside of Harris's home. However, none of the admitted photographs depicted J.J.'s bed in relation to the door nor the inside of Harris's bedroom doorframe. So on cross-examination, the prosecutor questioned Harris about whether other

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photographs may exist and whether Harris had taken other photos. Harris testified that he had taken a photograph of J.J.'s bed in relation to the door and of the inside of his doorframe. By introducing a selective set of photographs, Harris opened the door to questioning about other photographs that might definitively decide the issue. Therefore, we hold that the prosecutor's conduct was proper.

3. Granting and Denying Requests

Harris argues that the trial court erred when it "sustain[ed] all of [the] prosecuting attorney's requests, while denying all of [the] defense's requests." SAG at 2. Under RAP 10.10(c), while citations to the record and authority are not required, we will not consider a SAG if "it does not inform the court of the nature and occurrence of alleged errors." Here, Harris's use of the word "requests" is vague; it does not provide us with the ability to determine the nature and occurrence of the alleged errors. Therefore, we do not consider this argument.

CONCLUSION

We hold that (1) (a) the prosecutor committed misconduct by appealing to the passions and prejudices of the jury and expressing personal opinions on facts not in evidence, but Harris has waived his challenge because any resulting prejudice could have been cured by an instruction, (b) the prosecutor did not misrepresent the law, and (c) the cumulative effect of the prosecutor's misconduct does not require reversal; (2) Harris's ineffective assistance of counsel claim fails because defense counsel's representation was not deficient; (3) the trial court did not abuse its discretion in excluding Harris's home surveillance footage and his investigator's testimony because the evidence was cumulative; (4) the trial court did not violate Harris's right to be present or the presumption of innocence because he was physically present in the courtroom during the

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entire trial and was not admonished in front of the jury; and (5) no cumulative error existed. We also hold that Harris's SAG challenges fail. Accordingly, we affirm.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record in accordance with RCW 2.06.040, it is so ordered.

We concur:



Lee, J.



Bjorgen, C.J.



Johanson, J.

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2/10/2017

State of Washington, County of Pierce ss: I, Kevin Stock, Clerk of the
aforementioned court do hereby certify that this foregoing instrument is
a true and correct copy of the original now on file in my office.

IN WITNESS WHEREOF, I herunto set my hand and the Seal of said
Court this 15 day of August, 2018



Kevin Stock, Pierce County Clerk

By /S/Linda Fowler, Deputy.

Dated: Aug 15, 2018 4:20 PM



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APPENDIX "D"

Case Number: 14-1-00309-1 Date: August 15, 2018
SerialID: 11610B9C-99D2-46CE-A2A0A AFC93EFBFD5
Certified By: Kevin Stock Pierce County Clerk, Washington

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DEPARTMENT OF CORRECTIONS
DIVISION OF COMMUNITY CORRECTIONS

1016 S. 28TH STREET
TACOMA WA 98405
253-680-2603/FAX 253-597-4352

DATE: 4/6/15

DESTINATION:

JUDGE HOGAN: (253) 798-7448
DPA KARA SANCHEZ: (253) 798-6636
DEF. ATTY. MARK TREYZ: (253) 295-3251

FROM: Joe Sofia, DOC PSI INV.

OF PAGES (INCLUDING THIS PAGE) 19

COMMENTS:

PSI REPORT FOR HARRIS, DARREL: 14-1-00309-1

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STATE OF WASHINGTON
DEPARTMENT OF CORRECTIONS

PRE-SENTENCE INVESTIGATION (PSI)

TO: The Honorable Vicki L. Hogan
Pierce County Superior Court

DATE OF REPORT: 3/31/15

NAME: Harris, Darrel L.

DOC NUMBER: 381154

ALIAS(ES): N/A

COUNTY: Pierce

CRIMES: Rape of a Child in the First Degree (Count I);
Child Molestation in the First Degree (Count II);
Indecent Liberties/Domestic Violence (Count III)

CAUSE #: 14-1-00309-1

DATES OF OFFENSES: Counts I and II: Between 10/13/13 and 11/9/13
Count III: Between 11/5/13 and 11/6/13

SENTENCING DATE: 4/17/15

PRESENT ADDRESS: Pierce County Jail

DEFENSE ATTORNEY: Mark S. Treyz
401 Broadway,
Suite 208,
Tacoma, WA 98402

I. OFFICIAL VERSION OF OFFENSE:

Pursuant to the Information filed on January 24th, 2014 in Pierce County Court, the Pierce County Prosecuting Attorney's Office formally charged Mr. Harris with one Count of Rape of a Child in the First Degree (Count I), one Count of Child Molestation in the First Degree (Count II), and one Count of Indecent Liberties (Count III), all Counts Domestic Violence-related. On February 6th, 2015, an Amended Information was filed in Pierce County Court wherein the Pierce County Prosecuting Attorney's Office formally charged Mr. Harris with the same three aforementioned Counts, but with Count III only being Domestic Violence-related. Opening statements in his Jury Trial relative to these charges began on February 12th, 2015. He was found guilty of all three of those Counts on February 25th, 2015. He is currently in custody at the Pierce County Jail, and is scheduled to be sentenced on April 17th, 2015 in front of the Honorable Vicki L. Hogan:

The following was extracted from the Declaration for Determination of Probable

NTAR

R293

4/8/2015

DEPARTMENT OF CORRECTIONS
DIVISION OF COMMUNITY CORRECTIONS

1016 S. 28TH STREET

TACOMA WA 98405

253-680-2603/FAX 253-597-4352

DATE: 4/6/15

DESTINATION:

JUDGE HOGAN: (253) 798-7448

DPA KARA SANCHEZ: (253) 798-6636

DEF. ATTY. MARK TREYZ: (253) 295-3251

FROM: Joe Lopez, DOC PSI INV.

OF PAGES (INCLUDING THIS PAGE) 19

COMMENTS:

PSI REPORT FOR HARRIS, DARREL: 14-1-00309-1

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STATE OF WASHINGTON
DEPARTMENT OF CORRECTIONS

PRE-SENTENCE INVESTIGATION (PSI)

TO: The Honorable Vicki L. Hogan
Pierce County Superior Court

DATE OF REPORT: 3/31/15

NAME: Harris, Darrel L.

DOC NUMBER: 381154

ALIAS(ES): N/A

COUNTY: Pierce

CRIMES: Rape of a Child in the First Degree (Count I);
Child Molestation in the First Degree (Count II);
Indecent Liberties/Domestic Violence (Count III)

CAUSE #: 14-1-00309-1

DATES OF
OFFENSES:

SENTENCING
DATE:

Counts I and II: Between 10/13/13 and 11/9/13
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4/17/15

PRESENT ADDRESS: Pierce County Jail

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The following was extracted from the Declaration for Determination of Probable Cause filed by the Pierce County Prosecutor's Office on January 24th, 2014. It was based on Pierce County Sheriff's reports for Incident Number 133130513:

That in Pierce County, Washington, during the period between October 13, 2013, and November 9, 2013, the defendant, DARREL LORNE HARRIS, did commit the crimes of Rape of a Child in the First Degree and Child Molestation in the First Degree against, J.J. (DOB 10/13/08); and during the period between November 5 and 6, 2013, he did also commit the crime Indecent Liberties without Forcible Compulsion against K.M. (DOB 5/7/88). K.M. is J.J.'s mother. The defendant is K.M.'s uncle and J.J.'s great uncle and has never been married to the victims. All counts are domestic violence related.

On November 9, 2013, K.M. called the Pierce County Sheriff's Department and reported the following: She and her five-year-old daughter, J.J., moved in with the defendant about a month prior. On Tuesday or Wednesday that week, K.M. awoke in her bed to find the defendant rubbing her vagina over her clothes. She immediately got up and told him to stop. The defendant told her he just needed to be loved and talked about them being companions. He said she could live there for free if she would be with him and he always had a "thing for her". The defendant demanded sex twice a week if she were to live there for free. K.M. told the defendant his actions/feelings were inappropriate and she was his niece. He became rude and defensive. Later he wrote K.M. a note stating she was not his companion (the note was booked into evidence). K.M. said he previously threatened to kill her and she feared he would hurt her for reporting the incident to police.

A deputy later met with K.M. and picked up her written statement regarding the incident. She then reported to the deputy that J.J. disclosed that she was also molested by the defendant. In the deputy's presence, J.J. said, "He touched me in the private spot." J.J. said there was a finger in there and pointed to her vagina. J.J. disclosed, "The finger thing hurt and I don't want him to do it again." She said the defendant told her if she told, they would get caught.

On November 13, 2013, J.J. was forensically interviewed and disclosed the following: She and the defendant were on his bed when he took off his pants and shorts and opened her butt with his fingers. He was on top of her and pulled her to him. His penis went inside her body where she goes poop. J.J. said it was "wet" from his private spot. Initially she indicated it happened 33 times, but only indicated it happened once in his room. J.J. spoke of incident where the defendant covered her face so she could not see (she said he once put pillows over her head and another time he tied her mother's bathrobe on her face). He took off her pants and panties and rubbed all over her "shu-shu" or private spot with his hand (she clarified her shu-shu and private spot are her vaginal area). Her private felt "relaxing" during and fine afterward. The touching happened in the living room. The defendant did not want J.J. to tell and threatened to kill her.

He also threatened to kill cops. J.J. spoke of the defendant doing something to her mother and she knew because she saw. He grabbed her when she was sleeping and was going to take off her clothes. J.J. was five when the incidents happened. A detective attempted to contact the defendant at his home to arrest him, but was unsuccessful.

II. VICTIM/WITNESS CONCERNS (KM):

I attempted to telephonically contact KM, Mr. Harris's victim and also mother of his other victim JJ, on 1/31/15. One of the numbers I was given for her gave a constant busy signal when I dialed it, and the other number I obtained for her was disconnected when I tried to call it. See her attached handwritten statement.

III. MR. HARRIS'S STATEMENT REGARDING THE OFFENSES:

I met with Mr. Harris at the Pierce County Jail in the afternoon on March 30th, 2015 to interview him for this PSI; he was dressed in regular Jail clothing, appeared to be lucid, and he agreed to speak with me. Also present was his Attorney, Mr. Treyz; per his request, the crimes Mr. Harris were charged with in this matter were not discussed at all.

IV. CRIMINAL HISTORY:

SOURCES:

1. National Crime Information Center (NCIC) and Washington Crime Information Center (WASCIC).
2. Washington State Department of Corrections Offender Database.
3. Superior Court Operations Management Information System (SCOMIS).
4. Law Enforcement Support Agency (LESA).
5. District Court Information System (DISCIS).

Juvenile Felonies:	<i>None documented or found.</i>
---------------------------	----------------------------------

Adult Felonies:	
Dates of Offenses:	Counts I and II: Between 10/13/13 and 11/9/13 Count III: Between 11/5/13 and 11/6/13
Crimes:	Count I: Rape of a Child in the First Degree Count II: Child Molestation in the First Degree Count III: Indecent Liberties/Domestic Violence
County / Cause:	Pierce / 14-1-00309-1
Date of Sentence:	4/17/15 (Pending)
Disposition:	Found Guilty/awaiting Sentencing Score 6

Misdemeanor(s): Misdemeanors do not affect the offender score but do reflect the offender's view of societal values and should be acknowledged by the Court.

Juvenile Misdemeanors: *None documented or found.*

Crime	Date of sentence	Jurisdiction	Date of Crime	Adult or Juvenile	Felony or Misdemeanor
Reckless Endangerment	11/3/14	Tacoma Municipal Court	7/3/14	Adult	Gross Misdemeanor
DUI/Alcohol	9/8/08	Pierce County Dist. Court	7/8/08	Adult	Misdemeanor
DUI/Alcohol	10/12/01	Pierce County Dist. Court	4/20/01	Adult	Misdemeanor
DWLS 3 rd Degree	3/15/94	Tacoma Municipal Court	11/28/93	Adult	Misdemeanor
DUI/Alcohol	2/18/94	Pierce County Dist. Court	5/5/90	Adult	Misdemeanor
Reckless Driving	8/6/93	Pierce County Dist. Court	2/3/90	Adult	Misdemeanor
DUI/Alcohol	8/6/93	Pierce County Dist. Court	2/3/90	Adult	Misdemeanor

V. SCORING:

SERIOUSNESS LEVEL	OFFENDER SCORE	STANDARD RANGE
Count I XII	6	162 - 216 months min., up to life
Count II X	6	98 - 130 months min., up to life
Count III VII	6	From 57 to 75 months

VI. COMMUNITY CUSTODY:

SERIOUSNESS LEVEL	OFFENDER SCORE	STANDARD RANGE
Count I XII	6	Lifetime
Count II X	6	Lifetime
Count III VII	6	36 months

VII. RISK / NEEDS ASSESSMENT:

A risk / needs assessment interview was completed with the offender. The following risk / needs area(s) and strengths have implications for potential risk, supervision, and interventions. Unless otherwise noted, the following information was provided by the offender and has not been verified.

He only worked there for a year because he said that there "were a lot of fees you had to pay to the company", and he was only paid 50% of the commission he made from a sale. He had gone to Real Estate School prior to being employed at John L. Scott, and before that he had worked for the National Environmental Health and Safety Council, which was formerly AED Incorporated. He claimed that he had run that company for four or five years in the capacity of being President of the organization, and he was compensated at \$3000.00 a month plus commission. He stated that he has never been fired from any job in his life for cause, and he has never been a member of the U.S. Armed Forces in any branch or capacity.

Financial:

Financial stability and self-sufficiency are pro-social. Financial problems are considered stressors, which may be indicative of anti-social attitudes or precipitators of inappropriate ways to get money.

Mr. Harris reported that the only assets he owns are a Roth IRA account with less than \$100.00 in it, and a 2000 Dodge Dakota Truck which he stated was paid off in full. He said that he has two bank accounts; one with Columbia Bank and the other at Harborstone Credit Union, and both are still open but have minimal balances if any money at all in them. In terms of debt, he divulged that he owes the IRS between eight to ten thousand dollars. He also had a credit card bill of about \$1200.00 to \$1300.00, but his "mother may have paid that off". He said that she also paid off a Toyota Camry Sedan for him; it was originally about a \$40,000.00 vehicle. He recounted that he had previously paid about half of that balance, but his mother had to pay Toyota \$6000.00 to take the car back. He stated that he has no other debts nor any other type of income at this time. His bail in this matter was set at \$35,000.00 cash or bond in this matter, and his mother and stepfather paid for a bond to enable his release from Jail. They also are paying for Mr. Treyz's legal services as he is a private Attorney in this case..

Family / Marital:

A satisfying family or marital situation indicates pro-social relationships and ties that are negatively correlated with criminal risk. Uncaring, negative or hostile relationships with relatives who have frequent contact indicate poor social and problem-solving skills and a lack of pro-social modeling. Parental influence is a behavioral control that inhibits anti-social behavior and is a source of pro-social modeling.

Mr. Harris told me that his biological parents had been married for 29 years before they divorced when he was in his late 20s, and both of them had been in his life throughout his childhood and upbringing. His father was named Jerry Douglas Harris, and he was 74 years old when he passed away in 2007.

He was last residing in Tacoma, and he was retired from the U.S. Air Force after having served a 32-year career therein. Mr. Harris said that the two of them had a "great" relationship when Jerry was alive, and they were "very good friends". He recalled that they had "falling outs" when he was in his late teens, and Jerry would discipline him by giving him "spankings when he deserved it". He explained the spankings as Jerry using "a belt" on him, but there were no injuries inflicted; it was to bring Mr. Harris's attention to his misbehavior and wasn't abusive. He also recounted that Jerry was 6'3", and lots of the discipline "was intimidation". He added that his father "was fair and investigated" any misbehavior before delivering any punishment, but he was "very strict".

When asked if there were any memorable events he had involving Jerry, Mr. Harris said there were "lots". He recalled one especially, when the family had gone camping in Florida. They had traveled in a Station Wagon, while pulling a trailer, to Silver Springs. He recollected that Jerry had been the first of them to jump into the water there, and then surfaced and stopped the rest of them from coming in also because the water was freezing cold. He stated that they had "traveled all over" as well, and Mr. Harris mentioned that he had been born in Oahu, Hawaii. He last had contact with his father prior to finding him dead on his (Mr. Harris's) first day of working in the Real Estate industry, and Jerry had no criminal history that Mr. Harris knew of other than "a DUI long ago".

Mr. Harris said that his mother was remarried years ago, and her name is Lois E. Gilmore now. She is 79 years old and lives in Tacoma, and she is now retired after having worked for Pan American. He disclosed that he has always gotten along "great" with her as well, and they have "always been there for each other". He said that he has always accommodated her, helping her with things such as doing plumbing work for her, retaining different account numbers for her, and helping her with her medical issues. He stated that Lois would discipline him by "trying to spank him, but it didn't hurt, she'd then say wait until your father comes home". He went on to say that she was strict also, but she made them breakfast every morning and had dinner on the table at 5:30PM every night. She was also a homemaker and "a very good cook".

When asked if there were any memorable events he had involving his mother, Mr. Harris replied there was once when he was skiing. She was watching him ski down a run one time, and when he finished the run he slid up to her and gave her a kiss on the cheek. He also recalled once when they were in Florida while she had been sitting in an armchair watching him swimming, and he got caught in an undertow. He went under the water, and she scarred her legs getting out of the chair to go and pull him out. He said that she comes and sees him at the Jail during every visitation, the last time being on Saturday, 3/28, and she has no criminal history that he was aware of.

As Mr. Harris was working more than one job prior to being taken into custody in this matter, he presumably would have had considerably less free time for himself as compared to someone else working at a full-time job. He told me that in his spare time he likes to play "X-Box" and has a 65" TV that he watches movies on. He said that he also likes outdoor activities, such as swimming, camping, fishing, etc., during the summertime. He stated that he also enjoyed walking his dog when it was alive.

Companions:

The presence of criminal acquaintances and/or friends is associated with an opportunity for pro-criminal modeling, which is considered a major risk factor. A lack of pro-social companions means a diminished opportunity to observe pro-social models and no reinforcement for pro-social behaviors.

When asked how many close friendships he's had in his life thus far, Mr. Harris replied that he has "five right now", and there has "always been two or three since high school". He disclosed that he currently has three best friends: Towne Collins, who was his Real Estate "boss" but who currently has major health issues; Don Satre, who was his neighbor at Hidden Glen and whom he has known for eight or nine years; and Jim Robinson, whom he has known for the last twenty to twenty-five years and has "been around forever, they've been very close for the last fifteen years.". Mr. Harris also stated, relative to Towne, that "his son would say he (Mr. Harris) is his best friend. He claimed that he has never associated with anyone he knew to be involved in any kind of criminal activity. He recounted that there were a "couple residents that tried" and did "little things that upset everyone that lived around them".

Alcohol / Drug Use:

A history of substance abuse is a risk factor for criminal behavior. Substance abuse erodes significant pro-social bonds that contribute to increased criminal risk. Substance misuse may facilitate or instigate criminal behavior.

Mr. Harris recollected that he first tried alcohol when he was about 21 years old. He acknowledged that he has had the intermittent DUI convictions (four total) over the years, and he stated that drinking "helped with the pain" of the negative things that happened in his life, such as the deaths of his father and his (Mr. Harris) blowing out his knee. He claimed that he was sober for over five and a half years until he got these charges against him. He stated that he "got depressed after his dog died, but never drank after" that happened. He noted that he had to stop going to the AA meetings he was attending relative to this matter.

Mr. Harris told me that he tried Marijuana once when he was 18, and he "hasn't touched it since".

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He also stated that he hasn't tried any other non-prescribed controlled substances or illegal drugs in his life. He said that he has been through a total of three Chemical Dependency treatment programs; one that was for a year, a two-year deferred program, and a three-year program as well. He asserted that he successfully completed all three courses of treatment, and he "went to lots of AA meetings" too. He stated that he had been going to three or four a week with his sponsor. He said that as far as he knew, his only immediate family members that have had any problems with alcohol or drug abuse were his sister and her children. He said he wasn't exactly sure what his sister's issues were, but "the kids do Marijuana, pills, and other things". He also stated that his sister was in prison in California back in the 90's, but he wasn't aware of what the specific circumstances were relative to that.

Emotional / Personal:

Mild anxiety and depression, as well as severe emotional and cognitive problems can interfere with an individual's ability to respond to occupational, social and psychological stressors. Coping deficiencies may increase the risk of criminal behavior.

Mr. Harris said that the most significant physical problems that he has are neck and lower back issues from being hit head-on by a truck in about 2004 or 2005. He stated that he has never been diagnosed with any emotional or mental health problems in his life, nor has he ever been prescribed any medications for such. He also admitted that after his dog died, he sent his mother and his brother "good-bye letters" and he "put a Glock (pistol) in his mouth" intent on killing himself. However, he called his Pastor before he pulled the trigger, who discouraged him from going on any further with the attempt. He recalled that this happened in around July or August of 2013. He also related that he went to therapy through his church for depression at one point, but that was the only treatment he ever received from a mental health professional. He also stated that to his knowledge, no member of his immediate family has ever been diagnosed with any mental health or emotional issues, nor have they ever received any treatment for such.

Mr. Harris considered the most significant event in his life to have been, at his twenty years old, when he injured his knee/"shattered the meniscus" within while skiing. He recalled the Doctor at that time told him that he wouldn't run, jump, skip, or do any related type activities with that leg again. He disclosed that the knee twists and hyperextends to this day. He exclaimed that he "was always doing sports and it was taken away from him at 20 years old". He also claimed that he has never been abused in any way, shape or form in his life.

Mr. Harris, when asked if he had a religious preference, stated that he is "Christian and believes in Jesus, and that he died for us and for our sins".

confinement for Count II; and, 75 months in confinement for Count III, all to be served concurrently; followed, upon release, by Community Custody for life under the supervision of the Department of Corrections and the authority of the ISRB; to submit to both an HIV test and a DNA test; No Contact with victims JJ and KM, or with any minors; to Register as a sex offender in County of residence, and thereafter to register per the Sex Offender registration statute; to obtain a Psychosexual Evaluation, and then comply with and successfully complete any and all recommended treatment; to forfeit any and all items that might be in police property; to maintain Law-Abiding behavior; to comply with conditions outlined in Appendix H, by the CCO, and on the Pre-Sentence Investigation; and, the Legal Financial Obligations as noted below in Section XI.

I am in agreement with the recommendations that the DPA has made as noted. I would further advocate that the Court order that Mr. Harris obtains both a Substance Abuse Treatment Evaluation and a Mental Health Evaluation, and then follows up on receiving any recommended treatment until it is completed.

Sentence Type/Option: Confinement within the Standard Range Sentence

Confinement: 216 months up to life Count I; 130 months up to life for Count II; and, 75 months in confinement for Count III, all to be served concurrently

Length of Community Custody: For life

Conditions of Supervision: See attached Appendix H

XI. MONETARY OBLIGATIONS:

Restitution: TBD Court Costs: \$200.00 DNA: \$100.00
Victim Penalty: \$500.00 DAC Atty. Fee: \$500.00

I certify or declare under penalty of perjury of the laws of the state of Washington that the foregoing statements are true and correct to the best of my knowledge and belief.

Submitted By:

Approved By:

 4/6/15
Date

 4.6.15
Date

Community Corrections Officer 3
1016 S 28th St, Tacoma, WA 98409
253-680-2610

Community Corrections Supervisor
1016 S 28th St, Tacoma, WA 98409
(253) 680-2684

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Kaylon Midgette

13-318-0513
Page 1 of 3

Darrel Harris came into my bed last week in the morning and I woke up to him unwantingly touching and rubbing my vagina. When I woke up I pushed his hands off of me and immediately got out of my bed. He, later that day told me he wanted me to be his "companion". He said he ~~was~~ always had a "thing" for me and had always "wanted" me. He continued to explain that if I was his "girlfriend" no one had to know, I didn't have to get a job and work, also I would be aloud to drive his truck but he wanted sex twice a week. I was shocked, and ~~was~~ told him that I was his neice and that was not appropriate. He then stated he did not care what anyone thought and no one had to know. He then became very defensive and rude so I went to my room. My daughter woke up and I continued on with my morning. Making my daughter breakfast and getting her ready for the day.

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Wednesday

Kayloni Midgetto

~~Thursday~~
My daughter and I stayed in the bedroom because I didn't know what to do, or what any one else could do. When I came out of the back bedroom I saw a note on the coffee table.

The note said "You are not my companion. You are a roommate. Act like a "roommate" Stop borrowing my clothes, stop asking for rides Stop acting like a family." He was in his room ~~and~~ laying down. I went to the door and asked him what the note meant. He stated he did not want a roommate, he wanted a "companion" I said what does "stop acting like a family" meant. He stated he never had cousins or uncles growing up and he doesn't "know know what that's like" ~~He~~ I had ~~asked him~~ said but we are family ~~you are~~ my uncee. He said again he doesn't want a roommate he wanted companionship. ~~He~~ He didn't care he wanted sex. ~~He~~ I then stated when do you want me to move out. He said I'm not giving you a time. We ended

13-313-0513
Page 2 of 3

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Kayloni Midgetto

The conversation because he had to get ready because he was taking me to the drs.

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IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF PIERCE

STATE OF WASHINGTON]	Cause No 14-1-00309-1
]	
	Plaintiff]	
	v.]	JUDGEMENT AND SENTENCE (FELONY)
Harris, Darrel L.]	APPENDIX H
	Defendant]	COMMUNITY PLACEMENT / CUSTODY
]	
DOC No. 381154]	

The court having found the defendant guilty of offense(s) qualifying for community custody, it is further ordered as set forth below.

COMMUNITY PLACEMENT/CUSTODY: Defendant additionally is sentenced on convictions herein, for the offenses under RCW 9.94A.712 committed on or after September 1, 2001 to include up to life community custody; for each sex offense and serious violent offense committed on or after June 6, 1996 to community placement/custody for three years or up to the period of earned early release awarded pursuant to RCW 9.94A.150 (1) and (2) whichever is longer; and on conviction herein for an offense categorized as a sex offense or serious violent offense committed on or after July 1, 1990, but before June 6, 1996, to community placement for two years or up to the period of earned release awarded pursuant to RCW 9.94A.150 (1) and (2) whichever is longer; and on conviction herein for an offense categorized as a sex offense or a serious violent offense committed after July 1, 1988, but before July 1, 1990, assault in the second degree, any crime against a person where it is determined in accordance with RCW 9.94A.125 that the defendant or an accomplice was armed with a deadly weapon at the time of commission; or any felony under chapter 69.50 or 69.52 RCW, committed on or after July 1, 1988, to a one-year term of community placement.

Community placement/custody is to begin either upon completion of the term of confinement or at such time as the defendant is transferred to community custody in lieu of early release.

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(a) MANDATORY CONDITIONS: Defendant shall comply with the following conditions during the term of community placement/custody:

- (1) Report to and be available for contact with the assigned Community Corrections Officer as directed;
- (2) Work at Department of Corrections' approved education, employment, and/or community service.
- (3) Not consume controlled substances or alcohol, except pursuant to lawfully issued prescriptions;
- (4) While on community custody do not unlawfully possess controlled substances;
- (5) Pay supervision fees as determined by the Department of Corrections;
- (6) Receive prior approval for living arrangements and residence location;
- (7) Defendant shall not own, use, or possess a firearm or ammunition.
- (8) Notify community corrections officer of any change in address or employment; and
- (9) Remain within geographic boundary, as set forth in writing by the Community Corrections Officer.

(b) OTHER CONDITIONS: Defendant shall comply with the following other conditions during the term of community placement / custody:

- 10. Reside at a residence and under living arrangements approved of in advance by your community corrections officer. You shall not change your residence without first obtaining the authorization of you community corrections officer.
- 11. Enter and complete, following release, a state approved sexual deviancy treatment program (if Court-Ordered) through a certified sexual deviancy counselor. You are to sign all necessary releases to ensure your community corrections officer will be able to monitor your progress in treatment.
- 12. You shall not change sexual deviancy treatment providers without prior approval from the Court and your community corrections officer.
- 13. You shall not possess or consume any controlled substances without a valid prescription.
- 14. Do not purchase, possess, or consume alcohol.
- 15. Do not enter into any location where alcohol is the primary product, such as taverns, bars, and/or liquor stores.
- 16. Have no contact with the victims (JJ and KM), or with any minors, without prior approval of the Court. This includes but is not limited to personal, verbal, written or contact through a third party.
- 17. Hold no position of authority or trust involving children under the age of 18.
- 18. Do not initiate, or have in any way, physical contact with children under the age of 18 for any reason, to include in employment, social, and recreational situations.
- 19. Have no contact with any minors or children under the age of 18 without prior approval from your community corrections officer and sexual deviancy treatment provider.

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- 20. Inform your community corrections officer of any romantic relationships to verify there is no victim-age children involved.
- 21. Submit to polygraph testing upon direction of your community corrections officer and/or therapist at your expense.
- 22. Register as a sex offender in your county of residence, per sentencing statute.
- 23. Do not go to or frequent places where children congregate, (I.E. Fast-food outlets, libraries, theaters, shopping malls, play grounds and parks, etc.) unless otherwise approved by the Court
- 24. Submit to testing for DNA purposes, and for an HIV test also.
- 25. Obtain a Psychosexual Evaluation, a Mental Health Evaluation, and a Substance Abuse Evaluation, and successfully complete any and all recommended treatment. Follow all conditions imposed by your sexual deviancy treatment provider and CCO.
- 26. Obey all laws.
- 27. You are prohibited from joining or perusing any public social websites (Face book, Myspace, Craigslist, etc.).

DATE

JUDGE, PIERCE COUNTY SUPERIOR COURT

State of Washington, County of Pierce ss: I, Kevin Stock, Clerk of the
aforementioned court do hereby certify that this foregoing instrument is
a true and correct copy of the original now on file in my office.
IN WITNESS WHEREOF, I herunto set my hand and the Seal of said
Court this 15 day of August, 2018



Kevin Stock, Pierce County Clerk

By /S/Linda Fowler, Deputy.

Dated: Aug 15, 2018 4:20 PM



Instructions to recipient: If you wish to verify the authenticity of the certified document that was transmitted by the Court, sign on to:

<https://linxonline.co.pierce.wa.us/linxweb/Case/CaseFiling/certifiedDocumentView.cfm>,
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This document contains 23 pages plus this sheet, and is a true and correct copy of the original that is of record in the Pierce County Clerk's Office. The copy associated with this number will be displayed by the Court.

PIERCE COUNTY PROSECUTING ATTORNEY

September 21, 2018 - 2:27 PM

Transmittal Information

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Appellate Court Case Number: 51942-9
Appellate Court Case Title: Personal Restraint Petition of Darrel Harris
Superior Court Case Number: 14-1-00309-1

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- 519429_Motion_20180921140724D2163222_7499.pdf
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