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No. 52362-1-II

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

STATE OF WASHINGTON,

Respondent,

v.

MICHAEL PALMER

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE STATE OF
WASHINGTON FOR GRAYS HARBOR COUNTY

BRIEF OF APPELLANT

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A. INTRODUCTION

Representation by counsel is a fundamental right. To defend himself against vague allegations of child molestation and assault, Michael Palmer insisted appointed counsel obtain pertinent evidence. Over his objection, the trial court permitted counsel to withdraw. After being appointed new counsel, the court then permitted new counsel to withdraw after Mr. Palmer alleged his attorney was not providing effective assistance. Rather than appoint new counsel, the court ruled Mr. Palmer involuntarily waived or forfeited his right counsel. Because Mr. Palmer did not waive or forfeit his right to counsel, this Court should reverse his convictions and remand for a new trial.

B. ASSIGNMENTS OF ERROR

1. In violation of article I, § 22 of the Washington Constitution and the Sixth and Fourteenth Amendments to the United States Constitution, the court erred by ruling Mr. Palmer waived or forfeited his right to counsel by his conduct.

2. In violation of Mr. Palmer's right to confrontation under article I, section 22 of the Washington Constitution and the Sixth and Fourteenth Amendments to the United States Constitution, the court erred by forbidding Mr. Palmer himself from cross-examining the two alleged victims and by having them face a different direction during their

testimony.

3. In violation of Mr. Palmer's right of self-representation under article I, section 22 of the Washington Constitution and the Sixth and Fourteenth Amendments to the United States Constitution, the court erred by forbidding Mr. Palmer himself from cross-examining the two alleged victims.

4. Eroding the presumption of innocence and violating Mr. Palmer's right to due process under article I, section 3 of the Washington Constitution and the Fourteenth Amendment to the United States Constitution, the court erred by forbidding Mr. Palmer himself from cross-examining the two alleged victims and by having them face a different direction during their testimony.

5. In violation of Mr. Palmer's privilege against self-incrimination, as guaranteed by article I, section 9 of the Washington Constitution and the Fifth and Fourteenth Amendments to the United States Constitution, the court erred by admitting testimony elicited by the prosecution that commented on Mr. Palmer's invocation of his right to remain silent.

6. In violation of due process under article I, section 3 of the Washington Constitution and the Fourteenth Amendment to the United States Constitution, the prosecutor committed incurable misconduct during closing argument. The court erred by not declaring a mistrial.

7. In violation of due process under the Fourteenth Amendment to the United States Constitution and article I, § 3 of the Washington Constitution, cumulative error deprived Mr. Palmer of a fair trial. The court erred by entering the judgment and sentence.

8. The court erred in calculating Mr. Palmer's offender score on count three.

9. The court erred by imposing one year of community custody on count two.

10. The court erred in issuing a judgment and sentence stating that Mr. Palmer shall receive an exceptional sentence.

11. The court erred in entering the following conditions of community custody: "pay supervision fees"; "have no contact with juveniles under 18 years of age"; "submit to random urinalysis testing"; "pay community placement fees"; "[a]void places where minors are known to congregate"; "hold no position of authority or trust involving minor children"; "[d]o not attend X-rated movies, peep shows, or adult bookstores"; "submit to . . . reasonable searches of your person and [property]"; "obey all laws"; "[h]ave no contact with minors"; "[h]ave no contact with the [victims'] immediate family"; [d]o not possess any photographic equipment"; "[o]btain and maintain full-time employment"; "[p]ay for all counseling services/therapy costs for your victims"; "consent

to DOC home visits”; and “obtain written permission . . . prior to visiting or staying overnight at any residence other than registered address.” CP 77-78, 81-82, 90-91.

12. The court erred in ordering that interest accrue on legal financial obligations.

C. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. The right to counsel is a fundamental right. It may be lost if a person is warned of the dangers of self-representation and that specific conduct will result in waiver. It may also be forfeited by extreme misconduct. The court did not warn Mr. Palmer of the risks of self-representation or that he would lose his right to counsel if he kept alleging ineffective assistance. Nor is an allegation of ineffective assistance misconduct. Did the court err in ruling Mr. Palmer waived or forfeited his right to counsel after naming his lawyer in a lawsuit?

2. Face-to-face confrontation through cross-examination is a fundamental right. The right to self-representation includes the right to conduct one’s defense and speak. Without supporting evidence that Mr. Palmer’s accusers would suffer serious emotional distress, the court required Mr. Palmer to submit his questions to his accusers in writing, that a court-appointed attorney read these questions for him, and that his accusers testify in a manner so that Mr. Palmer would not be in their view.

Did this procedure violate Mr. Palmer's confrontation or self-representation rights?

3. Court-room procedures that erode the presumption of innocence may result in an unfair trial. Did the court's special procedure in receiving the testimony of Mr. Palmer's accusers erode the presumption of innocence and deprive Mr. Palmer of a fair trial?

4. The privilege against self-incrimination entitles a person to remain silent following their arrest. Prosecutors and witnesses may not comment on the defendant's exercise of their right to silence. At trial, the prosecutor elicited testimony from the arresting officer that after Mr. Palmer had been confined to jail for a night, Mr. Palmer refused to speak to him and "do the right thing," which was to confess. Did this testimony comment on Mr. Palmer's exercise of his to silence?

5. It is misconduct for a prosecutor to vouch for a witness, argue that the jury must find witnesses are lying to acquit, denigrate the defense, express a personal opinion, or make a character-based argument. During closing argument, the prosecution vouched for its witnesses by arguing they had no interest in being untruthful, implied the jury had to find its witnesses were lying to acquit, denigrated the defense by opining that the defense was "ridiculous," and made a character based argument that Mr. Palmer was "a violent person." Did this misconduct deprive Mr. Palmer of

his right to a fair trial?

6. An accumulation of errors may deprive a defendant of a fair trial. Did cumulative error deprive Mr. Palmer of a fair trial?

7. A miscalculated offender score or standard range requires resentencing. The court miscalculated Mr. Palmer's offender score and standard range on count three. Is resentencing required?

8. On count two, Mr. Palmer was convicted of fourth degree assault, a misdemeanor. This does not carry with it a term of community custody. Must the year of community custody on this count be stricken?

9. Mr. Palmer did not receive an exceptional sentence. Yet the judgment and sentence states he shall receive one. Must it be corrected?

10. Conditions of community custody must be authorized by statute, be crime related, and be constitutional. Should this Court strike the conditions that are not authorized, not crime related, or unconstitutional?

11. Unless a defendant has the ability to pay, a court should not require he or she pay the costs of community custody. The court found Mr. Palmer indigent, yet ordered he pay costs of community custody. Should this requirement be stricken?

12. The law no longer authorizes interest on legal financial obligations. Should the interest accrual provision in the judgment and sentence be stricken?

D. STATEMENT OF THE CASE

Deanna Drummond is the mother of “P,” a girl, and “A,” a boy. 7/3/18RP 272. In July 2013, Ms. Drummond’s husband and the father of the two children died. 7/3/18RP 278. P was about six years old and A was close to two. 7/3/18RP 278.

In August 2013, Michael Palmer moved in with Ms. Drummond and the children in their home in Kansas. 7/3/18RP 278. According to Ms. Drummond, she met Mr. Palmer “online” and during “business trips” she had taken to Washington. Ex. 23, p. 3. Specifically, they met on “CollarMe,” a BDSM¹ website. Ex. 13 (email, p. 1-2).

As part of his religious beliefs, Mr. Palmer was a nudist. 7/6/19RP 409. Ms. Drummond was a confessed sadist who enjoyed having a nude, submissive person in her home.² Ex. 13 (email, p. 1-2, 7-8); 6/29/18RP 77-78. Notwithstanding this, Ms. Drummond claimed she learned Mr. Palmer was a nudist after he moved in. 7/3/18RP 279-80. P and A saw Mr. Palmer nude. 7/3/18RP 280

In March 2014, the family left Kansas. 7/3/18RP 281. After an

¹ See <https://en.wikipedia.org/wiki/BDSM> (“BDSM is a variety of often erotic practices or roleplaying involving bondage, discipline, dominance and submission, sadomasochism, and other related interpersonal dynamics.”).

² While permitting evidence of Mr. Palmer’s nudity, the trial court excluded evidence of Ms. Drummond’s BDSM lifestyle. CP 159; 6/29/18RP 77-78, 83.

“extended camping trip,” they settled in McCleary, Washington around May. 7/3/18RP 281. Ms. Drummond testified her relationship with Mr. Palmer was fine at first. 7/3/18RP 281-82. She became pregnant with Mr. Palmer’s son, “L,” giving birth sometime in 2015.³ RP 284; Ex. 23, p. 4.

Ms. Drummond’s daughter, P, has been diagnosed with autism spectrum disorder.⁴ 7/3/18RP 273. Due to her autism, she fell behind in school by about a year. 7/3/18RP 273, 275. Like many on the autism spectrum, P has echolalia.⁵ 7/3/18RP 304. Those with echolalia may repeat what they have heard. 7/3/18RP 304-05. P would sometimes become distracted or hyper-focused on objects, like television. 7/3/18RP 310-12. She exhibited tantrums ranging from stomping, pulling out her hair, screaming, and even banging her head against the floor or wall. 7/3/18RP 307. P’s younger brother, A, was not diagnosed with autism, but was very energetic. 7/3/18RP 277.

At Ms. Drummond’s invitation, Mr. Palmer disciplined P and A. 7/3/18RP 282-83; 7/6/18RP 412. In general, physical discipline was only used if other methods failed, like verbal warnings or time outs. 7/6/18RP

³ The record is unclear as to L’s precise date of birth.

⁴ See *The Diagnostic and Statistical Manual of Mental Disorders*, Fifth Edition, American Psychiatric Association, 50-59 (2013) (“DSM”).

⁵ DSM, p. 54 (defining “echolalia” as “the delayed or immediate parroting of heard words”).

409-11. If necessary, Mr. Palmer would use a light tap or flick P or A using his index finger. 7/3/18RP 376; 7/6/18RP 411. This would sometimes be necessary to get P's attention because she often fixated on the television. 7/3/18RP 310; 7/6/18RP 411. In rare circumstances, Mr. Palmer would temporarily hold P or A against a wall using their upper arms. 7/6/18RP 411, 417-18. He did not use this method on P in 2016 because she was too heavy. 7/6/18RP 417. As Ms. Drummond's pregnancy progressed, she perceived Mr. Palmer's discipline of the children becoming more aggressive. 7/3/18RP 282-84.

Around June 2015, Ms. Drummond made an allegation of domestic violence against Mr. Palmer. 7/3/18RP 284. Child protective services (CPS) became involved because, as Ms. Drummond put it, "I had had some alcohol, and so, CPS was involved and took the kids." 7/3/18RP 284. Mr. Palmer moved out and into his sister's home in Federal Way. 7/3/18RP 284-85. No charges were filed against Mr. Palmer. 7/3/18RP 327-28.

Because he was a safe parent, the State placed Mr. Palmer's son, L, in his care. 7/3/18RP 285. To facilitate visitation, Mr. Palmer visited Ms. Drummond's home with L about every weekend. 7/3/18RP 285-86. Mr. Palmer continued to practice nudity. 7/3/18RP 286. While Ms. Drummond was away, Mr. Palmer watched P and A. 7/3/18RP 292.

Around fall 2016, Mr. Palmer told Ms. Drummond he had been lying in bed taking a nap with L when he awoke to P violently pulling on his penis. 7/3/18RP 292; 7/6/18RP 422. Mr. Palmer stopped P and explained to her this was inappropriate. RP 423. Ms. Drummond testified Mr. Palmer “was quite upset and that I needed to talk to her about that.” 7/3/18RP 292. P also touched or tried touch both her younger brothers’ privates without their permission. Ex 13, p. 4; Ex. 17, p. 15.

Although both Mr. Palmer and Ms. Drummond spoke to P about her behavior, P touched Mr. Palmer while he was napping in bed two more times. 7/6/19RP 423-426. During the third incident, in stopping P, the back of Mr. Palmer’s hand incidentally contacted P’s groin, which was covered by her underwear. 7/6/18RP 425.

Because P had started masturbating in the living room in front of others, Mr. Palmer suggested to Ms. Drummond that P be provided a corded vibrator to encourage her to engage in this behavior privately in her room. 7/6/18RP 421; Ex. 8, p. 2; Ex. 23, p. 14.

Around late December, Mr. Palmer sought help for P’s behaviors with The Arc of King County, a group that advocates for developmentally disabled persons.⁶ 7/3/18RP 294; 7/6/18RP 407, 427 Mr. Palmer used to

⁶ <https://arcokingcounty.org/about/>.

work for this organization. 7/6/18RP 407.

A couple of weeks earlier, around mid-December, Mr. Palmer was driving the family to a holiday event in Olympia. 7/3/18RP 344. Ms. Drummond was in the front and the children were in the back, with A sitting in the middle. 7/3/18RP 345-46; 7/6/18RP 414. While Mr. Palmer was driving, A violently kicked the front seat and Mr. Palmer. 7/6/18RP 414. Because this was dangerous, Mr. Palmer pulled over. 7/6/18RP 414. He reached back to grab A's shoulders, but A moved, resulting in A being accidentally scratched by Mr. Palmer. 7/6/18RP 414. No medical attention was necessary and they went to the holiday event. 7/6/18RP 416-17.

On January 3, 2017, as part of a CPS referral, Deputy Jeremy Holmes spoke to Ms. Drummond about the foregoing incident. 7/5/18RP 27-29; Ex. 24. No one alleged Mr. Palmer had choked or strangled A or P. 7/5/18RP 47. Ms. Drummond expressed concern about whether she would be able to see L and that Mr. Palmer was threatening to not let her see him. Ex. 24. After the deputy spoke to Mr. Palmer, the investigation into this incident was closed. See 7/5/18RP 82-83.

Shortly after, Ms. Drummond moved with P and A to Aberdeen, away from Mr. Palmer.⁷ 7/3/18RP 295. L remained in Mr. Palmer's

⁷ Ms. Drummond claimed have moved to Aberdeen on January 1, 2017, but Officer Holmes spoke to Ms. Drummond in her McCleary home on January 3, 2017. 7/3/18RP 295; Ex. 24, p. 1.

custody. Ex. 2, p. 4. The record is unclear if Ms. Drummond was having any visits with L. Ms. Drummond testified she had no contact with Mr. Palmer following her move. 7/3/18RP 295.

On March 22, 2017, Ms. Drummond was speaking with a parent assistance provider, Margaret Cabell, about Mr. Palmer. Ex. 9, p. 1. Ms. Drummond told Ms. Cabell about a conversation she had about 10 days earlier with P. Ex. 9, p. 1. Ms. Drummond had specifically asked P if Mr. Palmer ever touched her in her private area. 7/3/19RP 294. P purportedly said he had. 7/3/19RP 294. Ms. Drummond did not question P in detail. 7/3/19RP 294. Ms. Cabell told her she was a mandatory reporter and that Ms. Drummond should contact law enforcement. Ex. 9, p. 2.

The next day, Ms. Drummond called the police and told them she wanted to file a report about her ex-boyfriend sexually assaulting her nine-year old daughter. Ex. 23, p. 3. The following day, Deputy Richard Ramirez interviewed Ms. Drummond. Ex. 23, p. 3. Before the interview, Ms. Drummond had prepared a typed statement. Ex. 23, p. 3.

Ms. Drummond stated she had recently filed an order of protection against Mr. Palmer that included not only her, P, and A, but also L. Ex. 23, p. 4. Following her filing, CPS took L into custody. Ex. 23, p. 4. Ms. Drummond alleged she was concerned Mr. Palmer had sexually assaulted P and A. Ex. 23, p. 3-5. Although alleging that she had seen Mr. Palmer

grab the children by their collars, she did not allege that Mr. Palmer had strangled or choked P or A. Ex. 23, p. 5.

On March 28, 2017, at Deputy Ramirez's recommendation, Ms. Drummond took P and A to be interviewed. Ex. 23, p. 5-6. Michael Clark interviewed P first. 7/5/19RP 112; Ex. 17, p. 1; Ex. 20, p. 1. In the interview, which was video recorded, P spoke about Mr. Palmer disciplining her and said he choked her. Ex. 20, p. 10-11.⁸ She said Mr. Palmer broke her bones, which P would later admit was not true. Ex. 20, p. 18; 7/3/19RP 374. In response to a question about Mr. Palmer telling her secrets, P said, "He didn't want me to have fruit snacks because I wasn't allowed to. From that day, I didn't trust Michael at all." Ex. 20, p. 16. She identified "naughty stuff" as Mr. Palmer yelling at her. Ex. 20, p. 17-19. But she also spoke of having a nice Christmas with Mr. Palmer. Ex. 20, p. 15.

About half-an-hour into the interview, P said she was done, so they took a break. Ex. 20, p. 19; Ex. 19. During the break, Officer Ramirez conveyed to Ms. Drummond that P had not said what was necessary. See RP 7/5/18RP 99-100. Ms. Drummond then gave P "words of encouragement." 7/5/18RP 100. Following a nine-minute break, P

⁸ Exhibit 20 is the transcript of the interview. Exhibit 19 is the video recording.

resumed the interview by stating, “mama told me about how – about the touching.” Ex. 20, p. 19. P stated her mother “told me about Michael touching me. Michael touching.” Ex. 20, p. 20. P identified the touching as choking and being knocked on her head. Ex. 19 at 44:10-20. After further questioning, P said Mr. Palmer touched her “privates,” and that it had happened while they were napping without clothes on in her mother’s bedroom. Ex. 20, p. 22-26. P stated that her mom had told her to not touch Mr. Palmer’s privates. Ex. 20, p. 25.

Mr. Clark interviewed A. Exs. 16, 17. A spoke of Mr. Palmer giving him a “scar” on his neck after choking him in a car and that the scar was “invisible” now. Ex. 17, p. 7, 11. He also indicated Mr. Palmer would sometimes put him on the wall and choke him. Ex. 17, p. 8. He said Mr. Palmer did not touch his private, but that his sister tried to touch his private in the bath before. Ex. 17, p. 15. He said his brother L napped with Mr. Palmer “because he loves Michael.” Ex. 17, p. 11.

That evening, law enforcement officers arrested Mr. Palmer at his home in Federal Way. Ex. 23, p. 12-13. At a building near the Grays Harbor County jail, Deputy Ramirez interrogated Mr. Palmer. 7/5/18RP 64. Deputy Ramirez did not record the interrogation. 7/5/18RP 80. Mr. Palmer denied the allegations. 7/5/18RP 64. He explained how he disciplined the children and denied choking them. 7/5/18RP 70. He told

Officer Ramirez about the incidents from fall 2016 concerning P and A, as recounted earlier. 7/5/18RP 66-69, 72-73. Because Mr. Palmer had not “done the right thing,” i.e., confessed guilt, Deputy Ramirez tried to get Mr. Palmer to confess the next day, testifying he thought “a day sitting in county jail” might change that. 7/5/18RP 75. But Mr. Palmer told Deputy Ramirez he did not want to talk. 7/5/18RP 75.

The prosecution charged Mr. Palmer with one count of child molestation in the first degree and two counts of assault of a child in the second degree. CP 420-21. The first count of assault alleged P as the victim and the second count of assault alleged A as the victim. CP 420-21. Both counts alleged assault by strangulation or suffocation. CP 420. The prosecution alleged these offenses occurred during a period between November 1, 2016 and March 29, 2017.

On April 6, 2017, P and A were interviewed separately by Lisa Wahl, a sexual assault nurse examiner. 7/5/19RP 157. These interviews were audio recorded. Exs. 27, 29.

P, who said Mr. Palmer was “in jail” because of what she had said, spoke of Mr. Palmer being a “mean” and “evil” person. Ex. 28, p. 1, 7, 14. But she also spoke of having a great Christmas with Mr. Palmer and being happy to see him. Ex. 28, p. 2. P told a story, that she later testified was untrue, about Mr. Palmer chasing her with a very sharp knife and

threatening to kill her. Ex. 28, p. 11; 7/3/19RP 373. In this story, Ms. Drummond jumped in front of Mr. Palmer and said, “Do not kill my daughter.” Ex. 28, p. 11. P’s fictitious story ended with the police taking Mr. Palmer away. Ex. 28, p. 11.

During the interview, P alleged that Mr. Palmer had choked only her. Ex. 28, p. 10. She said Mr. Palmer had touched her private with his hand. Ex. 28, p. 4. She also said she had seen Mr. Palmer’s private part get “a muscle” before. Ex. 28, p. 4. She said Mr. Palmer did not want her to touch his private part and that he did not touch her with his private part. Ex. 28, p. 4-5.

During A’s interview, A stated he did not touch Mr. Palmer’s penis and that Mr. Palmer did not touch his penis. Ex. 30, p. 8. A spoke about Mr. Palmer putting his hand around his neck while he was driving and that Mr. Palmer’s nail left a mark, which was “invisible” now. Ex. 30, p. 8-9. A stated he was able to breath while being choked and that his voice did not change afterward. Ex. 30, p. 9.

Mr. Palmer’s trial began in July 2018. As detailed below, Mr. Palmer was forced to represent himself after the court found, only a few weeks earlier, that he had waived or forfeited his right to an attorney. 6/15/18RP 205-06.

At trial, the jury heard testimony from law enforcement officers,

Ms. Drummond, P, A, Mr. Clark, Ms. Wahl, and Mr. Palmer. P provided vague testimony about being choked and hit. 7/3/18RP 363-66. P testified she did not know if Mr. Palmer had ever touched her, but also testified she had touched Mr. Palmer's private parts and that he had touched her private area when she did not have underwear on. 7/3/18RP 367-72. A provided contradictory testimony about being hit and choked, along with getting a "scar" from being scratched by Mr. Palmer. 7/5/18RP 11-23.

Mr. Palmer was not permitted to cross-examine P and A himself. 6/29/18RP 56-59; CP 158. Instead, an attorney who did not represent Mr. Palmer asked P and A questions Mr. Palmer wrote down. 7/3/18RP 372-383; 7/5/18RP 16-23. Mr. Palmer denied molesting P and denied strangling either P or A. 7/6/18RP 427, 431, 456. He argued he had used reasonable force in disciplining the children, as permitted by the law, and that his acts had been twisted into crimes he did not commit. 7/6/18RP 446-48; CP 141-42 (jury instruction #15) (physical discipline of child is lawful when reasonable and moderate and purpose is to restrain or correct the child).

On count one, child molestation, the jury found Mr. Palmer guilty. CP 133. The jury did not find that Mr. Palmer had strangled or choked P, finding him guilty of the lesser included offense of fourth degree assault. CP 134, 146. The jury found Mr. Palmer guilty of assault of a child in the

second degree as charged in count three, which concerned A. CP 135.

The court sentenced Mr. Palmer to an indeterminate sentence on count one of 82 months to life. CP 75. Over Mr. Palmer's objections, the court imposed many conditions of community custody. CP 81, 97-104, 8/17/18RP 474.

E. ARGUMENT

1. After alleging ineffective representation from counsel, the court ruled Mr. Palmer had forfeited his right to counsel and required him to represent himself. The deprivation of Mr. Palmer's right to counsel requires reversal.

a. Defendants have the constitutional right to representation by counsel.

Under the state and federal constitutions, defendants have the right to representation by counsel. Const. art. I, § 22; U.S. Const. amends. VI, XIV; City of Tacoma v. Bishop, 82 Wn. App. 850, 855, 920 P.2d 214 (1996).

Defendants may voluntarily give up their right to counsel and represent themselves by waiver. Faretta v. California, 422 U.S. 806, 834, 95 S. Ct. 2525, 45 L. Ed. 2d 562 (1975); City of Bellevue v. Acrey, 103 Wn.2d 203, 208-09, 691 P.2d 957 (1984). Because the right to counsel is superior to the right to self-representation, the presumption is against waiver. Acrey, 103 Wn.2d at 207. For a waiver to be effective, it must not only be unequivocal, but must also be knowing, voluntary, and intelligent.

Id. at 207-09. For this standard to be met, the defendant must be fully aware of the risks of self-representation. Id. at 211-12. At a minimum, the defendant must understand the seriousness of the charges, be aware of the maximum penalty, and that technical rules govern the proceeding. Id. at 211.

In rare circumstances, defendants may involuntarily give up their right to counsel through forfeiture or waiver by conduct. Bishop, 82 Wn. App. at 858-59; United States v. Goldberg, 67 F.3d 1092, 1100-01 (3d Cir. 1995).

Forfeiture is the opposite of a voluntarily waiver. Bishop, 82 Wn. App. at 858. It does not require the defendant be warned that any particular action will result in the loss of counsel. Id. at 850. It “applies only in very limited circumstances.” State ex rel. Schmitz v. Knight, 142 Wn. App. 291, 295, 174 P.3d 1198 (2007). There must be extremely serious misconduct. Bishop, 82 Wn. App. at 859; Goldberg, 67 F.3d at 1102. For example, even an assault by a defendant against their counsel does not automatically result in forfeiture and does not necessarily permit withdrawal of counsel. State v. Holmes, 302 S.W.3d 831, 847-48 (Tenn. 2010); State v. Fualaau, 155 Wn. App. 347, 359, 228 P.3d 771 (2010). Moreover, before a judge declares a defendant has forfeited his or her right to counsel, the court must hold a hearing where the defendant is

permitted to offer relevant evidence. Com. v. Means, 454 Mass. 81, 97, 907 N.E.2d 646 (2009).

Waiver by conduct is a hybrid between voluntary waiver and forfeiture. Bishop, 82 Wn. App. at 859; Goldberg, 67 F.3d at 1100. For waiver by conduct to apply, the record must show that (1) the defendant was aware of the risks of self-representation; and (2) the court warned the defendant that particular dilatory action or misconduct will constitute a waiver. Bishop, 82 Wn. App. at 859; Goldberg, 67 F.3d at 1100-01; see, e.g., State v. Afeworki, 189 Wn. App. 327, 347-48, 358 P.3d 1186 (2015) (waiver by conduct established where record showed these requirements were met).

b. History of representation and the court’s ruling that Mr. Palmer had “waived” his right to counsel.

Mr. Palmer was wrongly deprived of his right to counsel. To analyze the issue, a history of the case is necessary.

After charges were filed on March 30, 2017, the court appointed Christopher Baum to represent Mr. Palmer. 3/30/17RP 4. In October 2017, Mr. Baum moved to withdraw. 10/27/17RP 2. Mr. Palmer, who explained there had been lack of contact or communications with Mr. Baum, did not oppose withdrawal. 10/27/17RP 3-5. The prosecution did not oppose reappointment of counsel and had no comment. 10/27/17RP 5. Judge Ray

Kahler permitted Mr. Baum to withdraw and appointed David Mistachkin.
10/27/17 RP 5.

In February 2018, Mr. Mistachkin “suggested” that he be allowed to withdraw, explaining that Mr. Palmer expressed that he was not providing effective representation. 2/6/18RP 12-13. Mr. Palmer told Judge Kahler he did not want Mr. Mistachkin to withdraw, stating he wanted Mr. Mistachkin to obtain and review evidence he believed was relevant to his defense, particularly CPS records. 2/6/18RP 16. A day earlier, Mr. Palmer had filed a statement with the court alleging ineffective assistance and that his attorney was failing to gather evidence. CP 360-87. Judge Kahler did not permit Mr. Mistachkin to withdraw. The parties proceeded with a hearing concerning P’s competency to testify and the admissibility of child hearsay, but were unable to complete the hearing. 2/6/18RP 17-137.

Two days later, Mr. Mistachkin renewed his request to withdraw. 2/8/18RP 143-45. Mr. Palmer said he wanted Mr. Mistachkin to continue to represent him, telling the court they disagreed on some matters, but communicated adequately. 2/8/18RP 146-48. The prosecution invited the court to let Mr. Mistachkin withdraw, opining there would be “an appeal issue” if withdrawal was not permitted. 2/8/18RP 148-49. Judge Kahler, concerned about finishing the hearing and recognizing that, overall, Mr. Palmer was satisfied with his representation, denied the request. 2/8/18RP

150-51. Mr. Mistachkin stated he would be renewing his request to withdraw after the hearing was finished. 2/8/18RP 151-52.

A little over a week later, the parties reconvened to finish the hearing. 2/14/18RP 155. Following the hearing, Mr. Mistachkin argued he should be permitted to withdraw because Mr. Palmer did not trust him and that Mr. Palmer had been “a little hostile” with him during a meeting.

2/14/18RP 185. Mr. Palmer told Judge Kahler he was frustrated with the discovery, but that he wanted Mr. Mistachkin to remain. 2/14/18RP 187. The prosecution did not oppose withdrawal, representing there would be no prejudice to alleged victims’ family. 2/14/18RP 194. Judge Kahler granted Mr. Mistachkin’s request to withdraw. 2/14/18RP 195.

Two days later, the court appointed Michael Nagle to represent Mr. Palmer. 2/20/18RP 28-29. Mr. Nagle withdraw about a week later due to a conflict of interest and Sean Taschner was appointed. 2/26/18RP 30. Mr. Taschner was also permitted to withdraw about a week later because his firm did not have the resources to represent Mr. Palmer. 3/5/18RP 32. These withdrawals had nothing to do with Mr. Palmer.

About a week later on March 12, Judge David Edwards appointed David Arcuri. 3/12/18 RP 34-35; Supp. CP __ (sub. 96). Judge Edwards did not warn Mr. Palmer that Mr. Arcuri would be his last court-appointed

lawyer. 3/12/18 RP 34-35.⁹

At a hearing on April 10, Mr. Palmer expressed frustration with his inability to access legal materials and requested permission to represent himself if he was given the means to conduct legal research. 4/10/18RP 198. Judge Edwards stated there was no library in the courthouse due to construction, and the prosecution reported to the court there was no research station in the jail. 4/10RP 198, 201-02. In light of this problem, Judge Edwards did not conduct a colloquy with Mr. Palmer about the risks of self-representation, stating that discussion would have to happen later. 4/10/18RP 203-03. Recognizing that Mr. Palmer appeared unsatisfied with Mr. Arcuri, Judge Edwards told Mr. Palmer if he was “going to be requesting a new lawyer, you are going to need to get something in writing that articulates specific facts, and it’s going to have to be something other than the fact that you haven’t been given access to a law library, that’s not

⁹ At the end of the hearing, in response to Mr. Palmer’s question on whether there would be “stand-by” counsel in case Mr. Arcuri quit, Judge Edwards told Mr. Palmer he would not be getting more than one lawyer:

THE DEFENDANT: Yeah. Is there any possibility of getting a stand-by, in case Mr. Arcuri decides to pull out? I haven’t fired an attorney yet.

THE COURT: Mr. Arcuri is not going to withdraw, and stand-by counsel has a different meaning than what you are referring to. You have all the attorneys you are going to get right there.

3/12/18 RP35.

Mr. Arcuri's fault." 4/10/18RP 202.

At a hearing on April 16 before Judge Kahler, Mr. Palmer stated he was still seeking self-representation, but only if he had access to legal research. 4/16/18RP 190. Prior to the hearing that morning, Mr. Palmer himself filed a document stating he was firing his attorney due to ineffective assistance. CP 321. He stated that while he "would love to have effective assistance of counsel," given the lack of effective representation, he would have to represent himself. CP 327. As this document was filed the morning of the hearing, Judge Kahler had not seen it. 4/16/18RP 190.

At a hearing on May 14, Judge Kahler stated he had reviewed Mr. Palmer's motion. 5/14/18RP 6. Judge Kahler stated, "I didn't understand it to be asking that Mr. Arcuri be removed as his counsel but just that he was noting some disagreements with some of the -- what appeared to be strategic decisions about the handling of the case." 5/14/18RP 6. Mr. Palmer informed Judge Kahler he believed Mr. Arcuri to be hostile to his defense. 5/14/18RP 7. After Judge Kahler asked the prosecutor if she had any comments, the prosecutor asserted, "I think what Judge Edwards says, we don't have any other attorneys for him to be assigned, that Mr. Arcuri is the last one that we have available." 5/14/18 RP 8. Judge Kahler told Mr. Palmer he was not entitled to an attorney who agreed with him on strategy and concluded the hearing. 5/14/18RP 10-12.

At a hearing on June 4, Mr. Arcuri moved to withdraw as counsel. 6/4/18RP 194. He explained that Mr. Palmer had named him as a defendant in a federal lawsuit.¹⁰ 6/4/18RP 194, 197-98. After confirming with Mr. Palmer that this was true, Judge Kahler ruled that Mr. Arcuri could no longer represent Mr. Palmer and that the court would set a hearing on how to proceed:

THE COURT: And Mr. Palmer is that correct that you have named Mr. Arcuri as a defendant in a federal lawsuit that you filed?

THE DEFENDANT: Yeah. I didn't bring the of number, but I think it's 13:18CV-0512626-BHS-DWC, if I remember.

THE COURT: Okay. I will agree with Mr. Arcuri that if - if you are now adverse to him in a lawsuit that you filed that - that he can no longer continue to represent you and I will put this on the docket then for next - next Monday to determine how to proceed, whether - whether new counsel be appointed or whether you'll need to proceed pro se at this time.

MR. ARCURI: I'll prepare an order, Your Honor.

6/4/18RP 199.

On June 11, Mr. Palmer filed a motion recounting that he had a right to counsel and asking that he be provided effective assistance of counsel. CP 259, 261, 267-68.

¹⁰ The lawsuit Mr. Palmer filed appears to have been primarily against Grays Harbor County and raised many complaints, one of which was ineffective assistance of counsel. CP 306.

On June 15, Mr. Palmer appeared before Judge Edwards without counsel. 6/15/18RP 200. Judge Edwards incorrectly asserted that when he appointed Mr. Arcuri in March, he told Mr. Palmer he had exhausted his opportunities to request court-appointed counsel. 6/15/18RP 200. In response to the court's questioning, Mr. Palmer told Judge Edwards he did not want to represent himself and that he wanted effective assistance of counsel. 6/15/18RP 201. Judge Edwards immediately ruled that Mr. Palmer had waived his right to attorney by his conduct:

THE COURT: I know you have recently filed documents claiming that - that the State of Washington doesn't adequately fund legal representation and that you - you've - you've - you want people to come up with more money to be sure that you are - you have legal representation that's fully funded. However, you are now in a position where you do not have counsel and I am not going to appoint further counsel for you. You have waived your right to an attorney by your conduct. This case has been pending now for some 15 or 16 months. You have avoided multiple trials in this case by creating artificial, unfounded, and unwarranted conflicts with the attorneys appointed to represent you. The issues that you have cited when you have requested new counsel or claimed that your counsel were hostile related almost exclusively to you not agreeing with advice that you were being given, which is not a basis for you obtaining new - new counsel.

6/15/18RP 201-202. Judge Edwards ruled Mr. Palmer would not be appointed a new attorney. 6/15/18RP 205. Before ruling, Mr. Palmer was not given an opportunity to be heard.

To solve the problem of Mr. Palmer's lack of access to legal

materials, the court appointed “standby” counsel, whose “sole job” would be conducting legal research for Mr. Palmer. 6/15/18RP 202. Judge Edwards told Mr. Palmer he would appoint Ronnie Soriano for this purpose. Judge Edwards explained that he had already “instructed Mr. Soriano that I was going to appoint him to do this” and stated “[h]e is prepared to do this.” 6/15/18RP 202-03.

Judge Edwards directed that a memorandum authored by Judge Kahler, prepared after Judge Kahler had allowed Mr. Arcuri to withdraw, be made part of the court file. 6/15/18RP 204-05. In the memo, Judge Kahler attempted to summarize the history of Mr. Palmer’s representation. Supp. CP __ (sub. no. 116). The memo expressed that Mr. Palmer had waived or forfeited his right to counsel by his conduct. Supp. CP __ (sub. no. 116). The memo states at the end that Mr. Soriano could be appointed as standby counsel to assist with legal research. Supp. CP __ (sub. no. 116).

c. Mr. Palmer did not waive or forfeit his right to counsel.

Mr. Palmer was erroneously deprived of his right to counsel. The record does not show voluntary waiver, forfeiture, or waiver by conduct.

First, although Mr. Palmer asserted at various times that he wished to represent himself, this was inadequate to establish a knowing, intelligent, and voluntary waiver of his right to counsel. The record does

not show that Mr. Palmer was ever warned by the court about the risks of self-representation. See Acrey, 103 Wn.2d at 211. Moreover, in a memorandum filed on May 7, Mr. Palmer plainly stated he did not want to proceed pro se and that he wanted effective assistance of counsel. CP 315-18. Any request to proceed pro se was equivocal. For these two reasons, Mr. Palmer did not knowingly, intelligently, and voluntarily waive his right to counsel. Acrey, 103 Wn.2d at 211-12; State v. Silva, 108 Wn. App. 536, 541, 31 P.3d 729 (2001) (no valid waiver where defendant was not advised of possible penalties for crimes with which he was charged).

Second, Mr. Palmer did not forfeit his right to counsel through misconduct. Forfeiture requires extreme misconduct. Bishop, 82 Wn. App. at 859; Goldberg, 67 F.3d at 1102. Mr. Palmer may have been a difficult client, but this does not justify forfeiture. That Mr. Palmer filed a lawsuit naming his attorney also did not justify forfeiture. Even assaults or verbal threats by a defendant against his or her own attorney does not necessarily result in forfeiture of the right to counsel. Holmes, 302 S.W.3d at 847-48; Means, 454 Mass. At 97.

Contrary to trial court's rulings, that a defendant files a lawsuit against his or attorney does not require withdrawal. See Fualaau, 155 Wn. App. at 361 ("even where the defendant's misconduct causes a conflict of interest with defense counsel, the trial court is not necessarily required to

grant the attorney's motion to withdraw, thus necessitating the substitution of new counsel"); see, e.g., Carter v. Armontrout, 929 F.2d 1294, 1300 (8th Cir. 1991) (pending lawsuit between defendant and attorney may create conflict of interest but defendant does not necessarily create such conflict merely by filing lawsuit). While suing one's own attorney is not healthy for the attorney-client relationship, neither are verbal threats or assaults. Moreover, the trial court failed to conduct a hearing where Mr. Palmer was permitted to offer relevant evidence. So the forfeiture doctrine does not apply. Means, 454 Mass. at 97.

Third, Mr. Palmer did not waive his right to counsel by his conduct. Mr. Palmer was never warned of the risks of self-representation by the court, a requirement for waiver by conduct to apply. Bishop, 82 Wn. App. at 859; Goldberg, 67 F.3d at 1100-01. Without the requisite warning, Mr. Palmer could not waive his right to counsel by conduct. Knight, 142 Wn. App. at 296 (without record of required warnings, waiver by conduct could not apply); In re Welfare of G.E., 116 Wn. App. 326, 336, 65 P.3d 1219 (2003) (same).

Additionally, waiver by conduct did not apply because the record does not show that Mr. Palmer was ever warned that any particular action, such as filing pro se motions or lawsuits, would result in waiver. Without such a warning, Mr. Palmer's action in naming his counsel in a lawsuit

seeking to vindicate his constitutional rights could not waive his right to counsel. See Knight, 142 Wn. App. at 296; G.E., 116 Wn. App. at 336; accord City of Seattle v. Klein, 161 Wn.2d 554, 562-63, 166 P.3d 1149 (2007) (no waiver of right to appeal could be implied by conduct absent warnings).

In the memorandum written by Judge Kahler and adopted by Judge Edwards, the trial court appears to have found Mr. Palmer waived his right to counsel through his conduct. The memorandum is both factually inaccurate and legally unsound.

The memorandum states that “Mr. Palmer was told by Judge Edwards at the time Mr. Arcuri was appointed that Mr. Arcuri would be the last court appointed attorney for Mr. Palmer.” Supp. CP (sub. 116, p. 1). The transcript from the hearing appointing Mr. Arcuri shows this is false. 3/12/18 RP 34-35. Moreover, the waiver by conduct doctrine does not permit a judge to arbitrarily rule that counsel will not be reappointed. Rather, the waiver by conduct doctrine requires adequate warnings followed by specific misconduct.

The memorandum asserts that in a filing submitted by Mr. Palmer on May 7, “Mr. Palmer acknowledged in that document that Judge Edwards had informed him that David Arcuri would be the last attorney who would be appointed by the court to represent him.” Supp. CP (sub.

no. 116 p.1). This is inaccurate. Mr. Palmer's filing states that "On 3-9-18, Mr. Arcuri advises me that he will be my last court appointed lawyer per Judge Edwards." CP 308. Apparently, Judge Edwards may have told Mr. Arcuri prior to his appointment or off the record that he would be Mr. Palmer's final appointed counsel. In any event, a judge cannot arbitrarily deprive a person of counsel simply by declaring a person will not receive another lawyer if a lawyer withdraws.

The memorandum states "Mr. Palmer was previously advised that Mr. Arcuri would be the last attorney appointed by the court to represent him and despite that chose to file a lawsuit against Mr. Arcuri." Supp. CP __ (sub no. 116, p. 2). To reiterate, the premise is false. Moreover, the record does not show that the court told Mr. Palmer that he would lose his right to counsel if he named his attorney as a defendant in a lawsuit. Thus, the memo incorrectly reasons that Mr. Palmer knew he would be required to represent himself if he took an action resulting in Mr. Arcuri withdrawing. Supp. CP __ (sub no. 116, p. 3).

The memorandum also erroneously states that "three [attorneys] undertook representation but ultimately withdrew at Mr. Palmer's request." Supp. CP __ (sub no. 116, p. 2). Mr. Baum did not withdraw at Mr. Palmer's request. 10/27/17 RP 3-5. Mr. Mistachkin was permitted to withdraw over Mr. Palmer's objection. 2/14/18RP 187. And Mr. Palmer

did not ask that Mr. Arcuri withdraw.

The memorandum speculates Mr. Palmer named Mr. Arcuri in his lawsuit to create a conflict and force withdrawal. Supp. CP __ (sub no. 116, p. 3). The record does not support this speculation. And even if it were true, the record does not show Mr. Palmer was warned that this conduct would result in him losing his right to counsel.

Without support, the memorandum asserts that “Mr. Palmer understands the risks of proceeding by representing himself.” Supp. CP __ (sub no. 116, p. 3). But without a colloquy from the court, it cannot be concluded that Mr. Palmer understood the dangers of self-representation. Acrey, 103 Wn.2d at 211-12.

In sum, the requirements for voluntary waiver, forfeiture, or waiver by conduct are not met. This Court should hold that the trial court erred in forcing Mr. Palmer to represent himself.

d. The error requires reversal and a new trial.

An error in the deprivation of the right to counsel is not subject to harmless error analysis. United States v. Gonzalez-Lopez, 548 U.S. 140, 148-50, 126 S. Ct. 2557, 165 L. Ed. 2d 409 (2006) (listing denial of counsel as structural error and concluding that deprivation of the right to counsel of choice was also structural error); Silva, 108 Wn. App. at 542 (rejecting argument that deprivation of right to counsel in criminal case

could be harmless). Accordingly, this Court should reverse the convictions and remand for a new trial.

2. Mr. Palmer himself was not permitted to cross-examine his accusers. This violated Mr. Palmer’s confrontation rights and his right to conduct his own defense.

a. Face-to-face confrontation is the norm and pro se defendants have the right to conduct their own defense.

Defendants have the right to confront and cross-examine the witnesses against them. U.S. Const. amend. VI; Const. art. I, § 22; Coy v. Iowa, 487 U.S. 1012, 1015, 108 S. Ct. 2798, 101 L. Ed. 2d 857 (1988); State v. Darden, 145 Wn.2d 612, 620, 41 P.3d 1189 (2002). The right to confront one’s accuser is an ancient right that can be traced back to the Roman era. Crawford v. Washington, 541 U.S. 36, 43, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004). The right is procedural and demands “that reliability be assessed in a particular manner: by testing in the crucible of cross-examination.” Id. at 61. Although the right is not absolute, the right typically contemplates face-to-face confrontation in court. Compare Coy, 487 U.S. at 1020 (use of a screen between defendant and witness violated confrontation clause absent showing of necessity) with Maryland v. Craig, 497 U.S. 836, 851-60, 110 S. Ct. 3157, 111 L. Ed. 2d 666 (1990) (statute permitting testimony of child via closed-circuit television permissible if there was showing child would suffer serious emotional distress by

defendant's presence and other aspects of confrontation are preserved); State v. Foster, 135 Wn.2d 441, 470-72, 957 P.2d 712 (1998) (plurality opinion) (same). Thus, while confrontation may sometimes upset a witness, it may also vindicate the wrongly accused:

That face-to-face presence may, unfortunately, upset the truthful rape victim or abused child; but by the same token it may confound and undo the false accuser, or reveal the child coached by a malevolent adult. It is a truism that constitutional protections have costs.

Coy, 487 U.S. at 1020.

Defendants who are acting as their own attorney do not lose their right to confrontation. Self-representation is a constitutional right. U.S. Const. amends. VI, XIV; Const. art. I, § 22; Faretta, 422 U.S. at 819. It carries with it the right to conduct the defense and speak for oneself.

McKaskle v. Wiggins, 465 U.S. 168, 177, 104 S. Ct. 944, 79 L. Ed. 2d 122 (1984). There is "no question that cross-examination of witnesses, in particular the principal accuser of the defendant, is a fundamental component of the right of self-representation." Com. v. Conefrey, 410 Mass. 1, 12, 570 N.E.2d 1384 (1991).

b. Over Mr. Palmer’s objection and without evidence showing the witnesses would suffer serious emotional distress from being questioned by Mr. Palmer, the court required Mr. Palmer to ask his questions through an attorney who did not represent him.

The prosecution moved to restrict Mr. Palmer’s presence in court and forbid Mr. Palmer himself from cross-examining P and A. Supp. CP ___ (sub. no. 155, p. 30-37); 6/29/18RP 48-53. The prosecution proposed that Mr. Palmer write down questions for P and A, and that Mr. Soriano—who had been appointed to help Mr. Palmer with legal research—ask the children Mr. Palmer’s questions.¹¹ 6/29/18RP 50-53.

Mr. Palmer objected. 6/29/18RP 53-56. He represented that he would have difficulty quickly writing follow-up questions due to a disability and that this would impede effective cross-examination. 6/29/18RP 55-56. The court expressed skepticism because Mr. Palmer had submitted many written filings, but Mr. Palmer explained he had a brace and wrap for his arm, and that he could not write quickly. 6/29/18 RP 55-56.¹²

Mr. Palmer also argued the prosecution had not shown the procedure was necessary, noting that P had an emotional support dog that

¹¹ The prosecution proposed closed-circuit television, but later acknowledged this procedure was inapplicable because Mr. Palmer was acting as his own lawyer. 6/29/18RP 50; RCW 9A.44.150(4).

¹² Ms. Drummond later corroborated Mr. Palmer’s disability. 7/3/18RP 313.

came to court with her. 6/29/18RP 54-55. The court granted the prosecution's request to have the county's courtroom emotional support dog accompany P and A when they testified. CP 165; Supp. CP __ (sub. no. 155, p. 47). Mr. Palmer agreed to the dog's presence, which had also been used at the pretrial hearing when P testified. Supp. CP __ (sub. no. 155, p. 47); CP 174.

Without hearing evidence from the prosecution on the matter, the court granted the prosecution's motion restricting cross-examination and overruled Mr. Palmer's objection. 6/29/18RP 56-58; CP 158. The court further ruled that while Mr. Palmer would remain in the courtroom, the children would face a different direction so they would not see Mr. Palmer when testifying. 6/29/18RP 56-58. The Court clarified that Mr. Soriano would simply follow a script and speak Mr. Palmer's questions. 6/29/18RP 59; CP 158.

This procedure was adhered to during P and A's testimony. Instead of Mr. Palmer examining them, Mr. Soriano appeared before these witnesses and read Mr. Palmer's questions. 7/3/18RP 372-383; 7/5/18RP 16-23. Prior to Mr. Soriano playing this role, the court told the jury that Mr. Soriano was not acting as an attorney, but was just asking questions Mr. Palmer prepared. 7/3/18RP 373. Likely so that neither P nor A would be confused, the questions about Mr. Palmer were framed in the third

person (“Michael,” “he”) instead of the first person, (“I,” “me.”).

7/3/18RP 372-383; 7/5/18RP 16-23. P and A consequently spoke of “he” when referring to Mr. Palmer rather than “you.” 7/3/18RP 372-383; 7/5/18RP 16-23.

c. The foregoing procedure violated Mr. Palmer’s right to confrontation and his right to conduct his own defense.

This procedure violated Mr. Palmer’s confrontation right and his right to conduct his own defense.

The Massachusetts Supreme Judicial Court has held a materially indistinguishable procedure violated a defendant’s constitutional right to self-representation. Conefrey, 410 Mass. at 12-13. In Conefrey, the defendant was charged with sexually abusing his eight-year-old daughter. Id. at 2. At the prosecutor’s request, the trial court ruled that the defendant must write out any questions he wanted to ask the complainant in cross-examination and to present them through standby counsel, who was appointed for this sole purpose. Id. at 8.

Conefrey held this procedure “denied the defendant a fair chance to present his case his own way because it literally required standby counsel to speak in his place, thereby hindering the defendant’s ability to conduct an effective cross-examination of a witness on whose credibility the Commonwealth’s case depended.” Id. at 13. The high court further

reasoned that the trial judge’s “mere belief” that the young complainant would be harmed absent the procedure was insufficient to justify the infringement. Id.

The same reasoning applies here. Having an attorney ask Mr. Palmer’s questions and appear in his place violated Mr. Palmer’s right to speak and conduct his own defense. The court heard no evidence that P or A would likely suffer severe emotional trauma from being cross-examined by Mr. Palmer. Absent such evidence, the court erred in restricting Mr. Palmer’s right to cross-examine his accusers himself. Id.; see Craig, 497 U.S. 858-60 (evidence needed to establish case-specific finding of necessity for closed circuit television procedure).

Similarly, the court erred in having the children testify in a manner so that Mr. Palmer would not be in their view. There was no showing they would be traumatized by seeing Mr. Palmer. In fact, no special procedure was followed when P testified at the child competency hearing, where Mr. Palmer was present. 2/6/18RP 74-90. There was no evidence presented that P suffered trauma by seeing Mr. Palmer at that hearing.¹³ Cf. Foster, 135 Wn.2d at 471-72 (plurality opinion) (evidence, including testimony of child at competency hearing, showed child would suffer serious emotional

¹³ Judge Edwards could not rely on his memory of how P appeared at that hearing because Judge Kahler presided over that hearing. 2/6/18RP 1, 74.

distress that would prevent communication if required to testify in defendant's presence).

This Court's opinion in State v. Estabrook, 68 Wn. App. 309, 842 P.2d 1001 (1993) is materially distinguishable. There, a judge read a prose defendant's questions to the witness. Estabrook, 68 Wn. App. at 317. On appeal, the defendant challenged this procedure, but he failed to provide relevant portions of the record and did not show that he had objected. Id. at 315, 319. This Court nevertheless reviewed the claimed error and assumed the State's representation of the trial court's rationale for the procedure was accurate. Id. at 315. Unlike in this case, the record in Estabrook showed the child's condition was especially vulnerable. She had been abused by others and had been confined to mental hospitals to treat severe behavioral problems. Id. at 311. Given all of this, this Court concluded the defendant's right of self-representation was not violated. Id. at 318-19.

Unlike in Estabrook, the record here is complete and Mr. Palmer objected to the procedure. An attorney who did not represent Mr. Palmer appeared in Mr. Palmer's place. Any risk of harm to the P and A was plainly not as great compared to the very vulnerable child in Estabrook. And Mr. Palmer raises a confrontation violation in addition to a right to self-representation violation.

In any event, this Court is not bound by Estabrook. In re Pers. Restraint of Arnold, 190 Wn.2d 136, 154, 410 P.3d 1133 (2018); see, e.g., State v. Morgan, 163 Wn. App. 341, 351, 261 P.3d 167 (2011). The Court should instead follow Conefrey and hold the procedure violated Mr. Palmer's confrontation and self-representation rights.

d. The error requires reversal.

A violation of a person's right to self-representation is per se prejudicial and is not subject to harmless error analysis. McKaskle, 465 U.S. at 177 n.8 ("right [of self-representation] is either respected or denied; its deprivation cannot be harmless"). Reversal is required. Conefrey, 410 Mass. at 13 (reversing on similar facts).

Setting the violation of Mr. Palmer's right to self-representation aside, the confrontation violation requires reversal. Constitutional error is presumed prejudicial and the prosecution bears the burden of proving the error harmless beyond a reasonable doubt. Chapman v. California, 386 U.S. 18, 24, 87 S. Ct. 824, 17 L. Ed. 2d 705 (1967); State v. Jasper, 174 Wn.2d 96, 117, 271 P.3d 876 (2012). P's and A's testimony were central to the case. Speculation that P's or A's testimony would have remained unchanged is improper. Coy, 487 U.S. at 1021-22. Given the importance of their testimony, reversal is required.

e. The procedure eroded the presumption of innocence and deprived Mr. Palmer of due process, requiring reversal.

The presumption of innocence in favor of the accused is enshrined by due process. U.S. Const. amend. XIV; Const. art. I, § 3; In re Winship, 397 U.S. 358, 363, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970). Courtroom procedures that erode this presumption, such as shackling a defendant or holding a trial in a jail, may violate due process. State v. Jaime, 168 Wn.2d 857, 862, 864, 233 P.3d 554 (2010) (holding trial in jail is inherently prejudicial); State v. Finch, 137 Wn.2d 792, 844, 975 P.2d 967 (1999) (recognizing that “the substantial danger of destruction in the minds of the jury of the presumption of innocence where the accused is required to wear prison garb, is handcuffed or is otherwise shackled”).

Here, the court’s procedure eroded the presumption of innocence. Except for when his accusers testified, Mr. Palmer acted as his own attorney and could be seen by the witnesses during their testimony. The court’s special procedure for receiving the children’s testimony was inherently prejudicial. A reasonable juror observing this procedure would infer that this procedure would only be necessary if Mr. Palmer were guilty. Given the lack of evidence showing the procedure was necessary, it violated due process. See Jaime, 168 Wn.2d at 865-66 (fact finding required to show that holding trial in jail was necessary). Because the

prosecution cannot prove this constitutional error harmless beyond a reasonable doubt, this Court should reverse. Chapman, 386 U.S. at 24.

3. In violation of the privilege against self-incrimination, the prosecution elicited testimony from a police officer that Mr. Palmer invoked his right to silence after his arrest. This constitutional error requires reversal.

a. Testimony that a defendant invoked his or her right to silence impermissibly comments on the defendant's exercise of the privilege against self-incrimination.

The federal and state constitutions protect against compelled self-incrimination. State v. Burke, 163 Wn.2d 204, 210, 181 P.3d 1 (2008); U.S. Const. amend. V; Const. art. I, § 9. The right is “intended to prohibit the inquisitorial method of investigation in which the accused is forced to disclose the contents of his mind, or speak his guilt.” State v. Easter, 130 Wn.2d 228, 236, 922 P.2d 1285 (1996). The privilege against self-incrimination includes the right to silence. Id. at 241. Eliciting testimony about a defendant's exercise of their right to silence post-arrest is constitutional error. State v. Romero, 113 Wn. App. 779, 786-87, 793, 54 P.3d 1255 (2002); State v. Knapp, 148 Wn. App. 414, 421, 199 P.3d 505 (2009).

b. The prosecutor elicited testimony from the arresting officer that Mr. Palmer refused to speak to him after spending the night in jail. This is manifest constitutional error.

The prosecution called Deputy Ramirez to testify. 7/5/18RP 52. He testified about his arrest and interrogation of Mr. Palmer. 7/5/18RP 62-64. He explained that after Mr. Palmer was advised of his Miranda¹⁴ rights, Mr. Palmer spoke with him. 7/5/18RP 63-64. After Deputy Ramirez testified about what was said, the prosecutor asked him if he ended his investigation after the interrogation. 7/5/18RP 75. Deputy Ramirez testified that, unsatisfied with Mr. Palmer's denials and thinking Mr. Palmer might "want to do the right thing" after being confined to a jail cell for night, he tried to speak with Mr. Palmer again. 7/5/18RP 75. But he testified Mr. Palmer refused to speak to him:

Q. Okay. Did that essentially end your involvement in this investigation after that interview was completed?

A No. I went back the next morning, thinking that, you know, *a day sitting in the county jail*, you know, there's some time to think, and maybe Mr. Palmer would want to *do the right thing* here.

So I went back to him. I took my sergeant, Sergeant Wallace at that time, with me. We walked in there. I introduced Sergeant Wallace. I introduced Michael Palmer.

Told him, you know, "You've had some time to think. Do you want to talk?" He told me, "You already told me I'm full of crap. No. I don't want to talk," and that was that.

¹⁴ Miranda v. Arizona, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966).

7/5/18RP 75 (emphasis added).

Mr. Palmer did not object. The error, however, is properly raised as a matter of right for the first time on appeal as manifest constitutional error. Romero, 113 Wn. App. at 786; RAP 2.5(a)(3). A direct comment on a defendant's right to silence qualifies as manifest constitutional error while an indirect comment may qualify. Romero, 113 Wn. App. at 790-91. "A direct comment on silence—such as a statement that a defendant refused to speak to an officer when contacted—is always a constitutional error." State v. Holmes, 122 Wn. App. 438, 445, 93 P.3d 212 (2004) (citing Romero, 113 Wn. App. at 790). An indirect comment will constitute constitutional error if it is "given for the purpose of attempting to prejudice the defense" or results "in the unintended effect of likely prejudice to the defense." Romero, 113 Wn. App. at 791.

Deputy Ramirez's testimony, that Mr. Palmer told him he was "full of crap" and did not want to talk, directly commented on Mr. Palmer's invocation of his right to silence. Id. at 793; Knapp, 148 Wn. App. at 421. Even if it could be deemed indirect, it would still be an unconstitutional comment because it may have been intended to prejudice the defense or unintentionally resulted in probable prejudice. Romero, 113 Wn. App. at 793; Holmes, 122 Wn. App. at 446. After all, Deputy Ramirez did not merely testify about what he did. Rather, he opined that Mr. Palmer was

guilty, testifying that he returned to talk because after “a day sitting in the county jail . . . maybe Mr. Palmer would want to do the right thing.”

7/5/18RP 75. Testimony that Mr. Palmer did not “do the right thing” (confess guilt) despite spending the night in jail, and instead invoked his right to silence, likely prejudiced the defense. See State v. Quaale, 182 Wn.2d 191, 199-200, 340 P.3d 213 (2014) (personal opinion that a defendant is guilty is improper); State v. Mullin-Coston, 115 Wn. App. 679, 693, 64 P.3d 40 (2003) (references to a defendant being in jail implicates the defendant’s right to the presumption of innocence). This Court should hold the officer’s testimony was constitutional error.

c. The prosecution cannot prove the error harmless beyond a reasonable doubt.

Because the admission of testimony commenting on a defendant’s right to silence is constitutional error, prejudice is presumed and the State bears the burden of proving the error harmless beyond a reasonable doubt. Chapman, 386 U.S. at 24. The Court must be able to conclude that any reasonable jury would reach the same result absent the error. State v. DeLeon, 185 Wn.2d 478, 487, 374 P.3d 95 (2016).

Here, the case turned on credibility determinations of P, A, and Mr. Palmer. That Mr. Palmer refused to speak to the police the morning after his arrest may have led one or more jurors to find Mr. Palmer’s

testimony not credible or insufficient to create a reasonable doubt.

Moreover, the jury evidently did not find P entirely credible because the jury found Mr. Palmer guilty of fourth degree assault (simple assault), not second degree assault of a child, which required proof of strangulation. CP 134, 140-41, 146.

It is also important to recognize that because testimony from law enforcement carries a special aura of reliability, the deputy's related improper commentary that Mr. Palmer had failed to do "the right thing" (confess guilt) likely prejudiced the jury against Mr. Palmer. See State v. Winborne, 4 Wn. App. 2d 147, 177, 420 P.3d 707 (2018). Because the error is not harmless beyond a reasonable doubt, this Court should reverse.

4. Prosecutorial misconduct deprived Mr. Palmer of his right to a fair trial.

a. It is misconduct to vouch for witnesses, misrepresent the role of the jury, denigrate the defense, or to inflame the passions and prejudices of the jury.

"Closing argument provides an opportunity for counsel to summarize and highlight relevant evidence and argue reasonable inferences from the evidence." State v. Salas, 1 Wn. App. 2d 931, 940, 408 P.3d 383 (2018). When a prosecutor makes improper arguments during closing, this misconduct may deprive defendants of a fair trial. In re Pers. Restraint of Glasmann, 175 Wn.2d 696, 703-04, 286 P.3d 673

(2012). The right to a fair trial is a fundamental liberty secured by the state and federal constitutions. Id. at 703-04; U.S. Const. amend. XIV; Const. art. I, § 3.

For this reason, prosecutorial “advocacy has its limits.” State v. Walker, 182 Wn.2d 463, 477, 341 P.3d 976 (2015). A “prosecutor’s duty is to ensure a verdict free of prejudice and based on reason.” State v. Claflin, 38 Wn. App. 847, 850, 690 P.2d 1186 (1984). A “prosecutor has a duty to act impartially in the interest only of justice.” State v. Warren, 165 Wn.2d 17, 27, 195 P.3d 940 (2008). To ensure defendants receive a fair trial, prosecutors must “subdue courtroom zeal,” not increase it. Walker, 182 Wn.2d at 477 (internal quotation omitted).

Prosecutorial appeals to the passions and prejudices of the jury is misconduct. State v. Belgarde, 110 Wn.2d 504, 507-08, 755 P.2d 174 (1988). Expressing a personal opinion, vouching for the credibility of a witness, denigrating the defense, or arguing the jury must find a witness is lying in order to acquit, all qualify as misconduct. State v. Lindsay, 180 Wn.2d 423, 433, 437, 326 P.3d 125 (2014); State v. Ish, 170 Wn.2d 189, 196, 241 P.3d 389 (2010); State v. Reed, 102 Wn.2d 140, 145-46, 684 P.2d 699 (1984); State v. Rich, 186 Wn. App. 632, 649, 347 P.3d 72 (2015), reversed on other grounds, 184 Wn.2d 897, 365 P.3d 746 (2016).

b. The prosecution committed misconduct during rebuttal by vouching for its witnesses, arguing the jury had to find particular witnesses were lying to acquit, calling Mr. Palmer’s defense “ridiculous,” and seeking conviction by claiming Mr. Palmer was a “violent person.”

The prosecutor committed misconduct during rebuttal by vouching for the credibility of its witnesses. The prosecutor opined that law enforcement and other professionals were “just doing their jobs” and that neither they nor Ms. Drummond, P, or A had anything to gain by “lying”:

But what does make sense in this case? Does it make sense that the children are *lying*? No. They don’t have any personal gain. What do they get out of *lying*? Nothing. Could they have been coached? Does that make sense? No. There is no opportunity for that. There is no coaching in this case. The interviews were done without mom. The testimony was done without mom. Does it make sense that Detective Ramirez or any of the other professionals *lied* in this case, somehow, to trap Mr. Palmer? No. There is no personal gain. They are *just doing their jobs*. *They are just investigating the case*.

RP 458-59 (emphasis added). Shortly thereafter, the prosecutor continued to vouch for the State’s witnesses, arguing that Mr. Palmer was the only person with something to “gain” and that his story was “ridiculous.”

Part of common sense is judging credibility. You also have your instructions about that. Your job is to look at who has what to lose, and who has what to gain. What do the professionals have to lose or gain? Nothing. Again, *they don’t have any personal interest in this case*. They are *just doing their jobs*. They are investigating, and then putting it forth to the prosecutors office to deal with. That’s it. What does mom have to gain? She is losing him. She has to live with the fact that she let this man into her life. She can look

back and say, yeah, I had a bad time, my husband died, I let this guy in. But she has to live with the fact that she let him in and this stuff happened to her children. That's a loss. There is no gain there. What do the children have to lose or gain? No gain. Only losses. The loss of their innocence, the loss of their trust, the loss of their normalcy in their lives. You heard from Ms. Wahl, it's a lifetime of healing that happens in these kinds of cases. There is no gain there. All losses. And what does the defendant have to lose or gain? If you believe his story, *as ridiculous as it is*, he gains not being convicted. *He is the only one who has something to gain in this case.*

RP 460-61 (emphasis added).

This Court's decision in State v. Jones, 144 Wn. App. 284, 293, 183 P.3d 307 (2008) shows this argument was improper. There, the prosecutor argued that a confidential informant was credible because the police officers would not have risked their careers by using an unreliable informant. Jones, 114 Wn. App. at 293. This Court held that the statements were improper because they bolstered the officer's character "by using facts not in evidence, namely that police . . . would suffer professional repercussions if they used an untrustworthy informant." Id. As in Jones, the prosecutor's argument improperly vouched for the State's witnesses. See also State v. Muse, No. 77363-1-I, 2019 WL 2341274, at *6 (Wash. Ct. App. June 3, 2019) (unpublished).¹⁵

¹⁵ GR 14.1.

Relatedly, the prosecutor improperly implied that the jury had to find that the prosecution's witnesses were "lying" in order to acquit. "It is improper for a prosecutor to argue that in order to acquit a defendant, the jury must find that the State's witnesses are either lying or mistaken."

Rich, 186 Wn. App. at 81. "This type of argument misrepresents the role of the jury and the burden of proof by telling jurors they must decide who is telling the truth and who is lying before deciding if the State has met its burden of proof." Id. Here, the prosecutor's argument violated this rule.

It was also improper for the prosecutor to express her personal opinion that Mr. Palmer's defense was "ridiculous" See Lindsay, 180 Wn.2d at 433 (improper to call defense counsel's argument a "crook"); State v. Thorgeron, 172 Wn.2d 438, 451, 258 P.3d 43 (2011) (misconduct to call defense counsel's argument "bogus" or involving "sleight of hand"). This kind of denigration is misconduct.

In addition to the foregoing misconduct, the prosecutor attempted to inflame the passions and prejudices of the jury by arguing Mr. Palmer had a propensity for violence and liked to hurt children:

What did he say in his testimony today? He talked about taking steps to control his reactions to not hurt his son. Why? Because he is *a violent person*, with children in particular. He hurts them. He knows that. He told you, that's why he has this reaction when he is talking about his son, because he already knows he is violent with children.

RP 459 (emphasis added)

What Mr. Palmer testified to was that when napping with his two-year-old son, L, he took measures to not reflexively react when awakened to ensure he did not accidentally hurt him. 7/6/18RP 422. But more importantly, the prosecutor's argument that Mr. Palmer was a violent person was an improper propensity argument. Salas, 1 Wn. App. 2d at 946 (prosecutor improperly used pictures to prove character traits of defendant and decedent "'in order to show action in conformity therewith,' improper under ER 404(b)"). The purpose was to enflame the passions and prejudices of the jury and seek a conviction based on Mr. Palmer's so-called "violent" character. The Court should hold this was misconduct.

c. The prosecutor's flagrant and ill-intentioned misconduct deprived Mr. Palmer of fair trial.

When a defendant shows that the prosecutor's conduct was improper and prejudicial, the appellate court should reverse. See Glasmann, 175 Wn.2d at 704. Reversal is required if there is a substantial likelihood the misconduct affected the jury verdict. Id. Flagrant and ill-intentioned misconduct excuses the lack of an objection, when an instruction would not have cured the resulting prejudice. Id. In analyzing prejudice, the misconduct should be viewed cumulatively rather than in isolation. Id. at 707. The focus is on the impact of the misconduct, not on

the otherwise properly admitted evidence. Walker, 182 Wn.2d at 479. Comments made during rebuttal are more likely to be prejudicial. Lindsay, 180 Wn.2d at 443.

While Mr. Palmer did not object, the context of this case shows that the prosecutor's remarks were so flagrant and ill-intentioned that no instruction could have cured the resulting prejudice. The prosecutor's misconduct struck at the core issue for the jury: the credibility of the witnesses and whether the jury should find Mr. Palmer's account credible. The prosecutor improperly argued the jury had to find its witnesses were lying to find Mr. Palmer not guilty. The prosecutor sought conviction not by arguing the evidence proved the charged crimes, but by expressing her opinion that Mr. Palmer was a violent person, particularly with children. All this misconduct occurred during rebuttal, making it more likely to be prejudicial. Lindsay, 180 Wn.2d at 443. Together, it is likely that this misconduct impacted the verdict. This Court should reverse.

5. Cumulative error deprived Mr. Palmer of a fair trial.

Due process entitles criminal defendants to a fair proceeding. An accumulation of errors may deprive a defendant of this right. Chambers v. Mississippi, 410 U.S. 284, 289 n.3, 93 S. Ct. 1038, 35 L. Ed. 2d 297 (1973). State v. Perrett, 86 Wn. App. 312, 322-23, 936 P.2d 426 (1997); U.S. Const. amend. XIV; Const. art. I, § 3. Reversal is warranted for

cumulative error when the combination of errors, including prosecutorial misconduct, denies the defendant a fair proceeding, even if each individual error is harmless by itself. Salas, 1 Wn. App. 2d at 952.

Any combination of the non-structural errors deprived Mr. Palmer of a fair trial. The procedure employed by the court when J and A testified deprived Mr. Palmer of his confrontation rights and eroded the presumption of innocence. The deputy who arrested Mr. Palmer commented on Mr. Palmer's exercise of his right to silence, while also commenting that Mr. Palmer had failed "do the right thing." And the prosecutor committed serious misconduct during closing argument. The evidence against Mr. Palmer was not overwhelming. See id. (cumulative error doctrine applied where evidence against the defendant was not overwhelming). Given the errors, Mr. Palmer is entitled to a new trial. See, e.g., State v. Alexander, 64 Wn. App. 147, 154, 822 P.2d 1250 (1992) (reversing rape of child convictions due to accumulation of errors, which included improper vouching testimony).

6. The judgment and sentence is riddled with errors, requiring remand.

a. The court miscalculated Mr. Palmer's offender score on count three, requiring resentencing.

This Court "has the authority, as well as the duty, to correct errors on the face of a judgment and sentence." State v. Hibdon, 140 Wn. App.

534, 537, 166 P.3d 826 (2007). An illegal sentence may be challenged for the first time on appeal. State v. Bahl, 164 Wn.2d 739, 744, 193 P.3d 678 (2008).

On count three, assault of a child in the second degree, the court calculated Mr. Palmer's offender score as a three. CP 73. Because Mr. Palmer's offender score should have been scored as a two, this was error.

For count three, Mr. Palmer's criminal history consisted of the other two offenses: first degree child molestation (count one) and fourth degree assault (count two). CP 73; RCW 9.94A.525.

Assault of a child in the second degree is a class B felony. RCW 9A.36.130. It is a "violent offense." RCW 9.94A.030(55)(a)(ix). As a "violent offense," two points accrue for prior violent felony convictions and one point for nonviolent felony convictions. RCW 9.94A.525(8). First degree child molestation is a "violent offense" because it is a class A felony, and therefore counts as two points. RCW 9A.44.083(2); 9.94A.030(55)(i). Fourth degree assault is a gross misdemeanor and therefore does not score. RCW 9A.36.041(2); 9.94A.525(8). Thus, the offender score for count three is two, not three. Resentencing is required.

b. The court incorrectly imposed one year of community custody on count two.

The court imposed one year of community custody on count two, the conviction for fourth degree assault. CP 76. This was error. Unless a person is convicted of the felony version of fourth degree assault, RCW 9A.36.041(3), fourth degree assault does not carry a term of community custody. RCW 9.94A.701(3)(a); 9.94A.411(2). The term of community custody must be stricken.

c. The judgment and sentence incorrectly states Mr. Palmer shall receive an exceptional sentence.

The judgment and sentence incorrectly says that “[t]he Defendant shall receive an exceptional sentence.” CP 82. This language should be stricken.

d. Conditions of community custody must be constitutional, authorized by statute, and crime-related.

The conviction on count one carries a life-term of community custody. CP 77. Over Mr. Palmer’s objections, CP 97-104, 8/17/18RP 474, the trial court entered many conditions of community custody that are unlawful. 8/17/18RP 485; CP 81. This Court should strike or modify them.

A trial court is authorized to impose discretionary community custody conditions as part of a sentence. RCW 9.94A.703(3). In addition

to listing several discretionary conditions, the statute permits a court to impose “crime-related” conditions:

As part of any term of community custody, the court may order an offender to:

...

(c) Participate in crime-related treatment or counseling services;

(d) Participate in rehabilitative programs or otherwise perform affirmative conduct reasonably related to the circumstances of the offense, the offender’s risk of reoffending, or the safety of the community;

...

(f) Comply with any crime-related prohibitions.

RCW 9.94A.703(3)(f). A crime-related prohibition “means an order of a court prohibiting conduct that directly relates to the circumstances of the crime for which the offender has been convicted.” RCW 9.94A.030(10).

This means the conditions must be “reasonably related” to the crime. State v. Johnson, 4 Wn. App. 2d 352, 358, 421 P.3d 969 (2018).

Community custody conditions are reviewed for an abuse of discretion. State v. Padilla, 190 Wn.2d 672, 677, 416 P.3d 712 (2018). A trial court abuses its discretion by imposing conditions that are unconstitutional, unauthorized by statute, or manifestly unreasonable. Id. For example, impermissibly vague community custody conditions are

invalid because they violate the constitutional prohibition against vague laws. Bahl, 164 Wn.2d at 745.

e. The conditions forbidding contact with children unconstitutionally deprives Mr. Palmer of his parental rights.

Natural parents have a fundamental right under the due process in the “care, custody, and management” of their children. Santosky v. Kramer, 455 U.S. 745, 753, 102 S. Ct. 1388, 71 L. Ed. 2d 599 (1982); U.S. Const. amend. XIV; Const. art. I, § 3.

Mr. Palmer has a young son, L. The court, however, ordered that he have no contact with any person who is less than 18 years old. CP 78, 82. This unconstitutionally infringes on his right to parent. See In re Pers. Restraint of Rainey, 168 Wn.2d 367, 381-82, 229 P.3d 686 (2010); State v. Ancira, 107 Wn. App. 650, 656, 27 P.3d 1246 (2001); State v. Letourneau, 100 Wn. App. 424, 427, 997 P.2d 436 (2000) (limitations on mother’s contact with her children not reasonably necessary because rape of a child conviction concerned child to whom she was not related). It should be rewritten to exclude L and any biological children.

Relatedly, the court ordered that Mr. Palmer have no contact with the immediate family of P or A. CP 90. As L is the brother of P and A, this may forbid contact with L. It should be modified to exclude L.

f. The conditions involving minors or children should be rewritten to clarify that they apply only to those under the age of 16.

The Court should also instruct the conditions be rewritten to apply only to children under the age of 16. “In the context of a sex offense, the term ‘children’ refers to individuals under the age of 16.” Johnson, 4 Wn. App. 2d at 361 (citing RCW 9A.44.073-.089). Forbidding Mr. Palmer from contact with minors 16 years or older is unreasonable. See id. at 361 n.3 (ordering condition that person avoid places where children congregate be modified to say “children under 16”). Mr. Palmer will likely have intermittent contact with 16 and 17 year olds because they drive cars, work jobs, and attend college.

g. The condition requiring Mr. Palmer to avoid places where children are known to congregate is vague, arbitrary, and not crime-related.

The court ordered Mr. Palmer to “[a]void places where minors are known to congregate without the specific permission of Community Corrections Officer (including, but not limited to, fast food establishments, shopping malls, parks, play grounds, schools, video arcades, etc.)” CP 90.

This condition is not crime related. The offense occurred in the home and no evidence shows Mr. Palmer trolled public places for minor

victims. It is unlawful. State v. Merrill, No. 35631-1-III, 2019 WL 2448668, at *4 (2019) (unpublished) (Fearing, J., dissenting).¹⁶

The condition is also unconstitutionally vague. A condition is unconstitutionally vague if it (1) fails to provide an ordinary person fair warning of the proscribed conduct, or (2) permits arbitrary enforcement. State v. Irwin, 191 Wn. App. 644, 653-54, 364 P.3d 830 (2015). Here, the word “congregate” is insufficiently definite. State v. Wallmuller, 4 Wn. App. 2d 698, 703, 423 P.3d 282 (2018), review granted, 192 Wn.2d 1009, 432 P.3d 794 (2019). Further, while there is an illustrative list of places, this is inadequate because the language, “including, but not limited to,” permits arbitrary enforcement. Id. at 703; Irwin, 191 Wn. App. at 655.

The condition is not crime related. It is unconstitutionally vague. For either reason, the condition should be stricken.

h. The condition forbidding the attendance of X-rated movies, peep shows, or adult books stores is not crime related.

A condition forbids Mr. Palmer from attending “X-rated movies, peep shows, or adult bookstores.” CP 90. This condition is insufficiently connected to convicted offense. Johnson, 4 Wn. App. 2d at 359-60 (striking same condition because merely being convicted of a sex offense is inadequate to provide necessary link). It must be stricken.

¹⁶ GR 14.1. The cited portion of this opinion did not win a majority vote.

i. The condition forbidding Mr. Palmer from possessing photographic equipment is not crime related.

A condition inexplicably forbids Mr. Palmer from possessing photographic equipment, including cameras or video cameras. CP 14. Photos had nothing to do with the offense. This condition is not crime related. And given that every modern cell phone has a camera, the condition is unreasonably burdensome. The condition should be stricken.

j. The condition requiring random urinalysis testing and searches of Mr. Palmer's person or property for drugs is not crime related. The conditions requiring Mr. Palmer consent to searches are unconstitutional.

One condition orders that Mr. Palmer submit to random urinalysis to test for whether he is using illegal or controlled substances. CP 90 (condition b7). It also states that Mr. Palmer must submit to "reasonable searches" of his person or property to ensure compliance with the condition of not possessing illegal or controlled substances. CP 90. Relatedly, another condition requires Mr. Palmer to "consent to DOC home visits to monitor compliance with supervision." CP 91

Because Mr. Palmer's offense did not involve drugs, the condition requiring drug testing is not crime related. The search conditions are also plainly unconstitutional. Before a probationer may be searched, there must be reasonable suspicion that a particular condition has been violated and a nexus between the property and the alleged probation violation. State v.

Cornwell, 190 Wn.2d 296, 301-02, 306, 412 P.3d 1265 (2018).

Accordingly, these unlawful conditions must be stricken.

k. The “obey all laws” condition is unconstitutionally vague.

One condition states Mr. Palmer must “[o]bey all laws.” CP 90.

This is unconstitutionally vague because it is not definite enough to provide notice and permits arbitrary enforcement. The condition does not clarify what “law.” International law? Federal law? State law? (which state?) Tribal law? (which tribe?) Foreign law? (which country?) County law (which county?) Municipal law? (which city?). Given the breadth, the condition also permits arbitrary enforcement. Unless the condition specifies the law, the condition is vague. See In re Blackburn, 168 Wn.2d 881, 885-87, 232 P.3d 1091 (2010) (allegation that person violated an “obey all laws” condition violated due process because it did not specify which law he had failed to obey.). The condition should be stricken.

l. The requirement that Mr. Palmer obtain and maintain full time employment is not crime related.

A condition orders that Mr. Palmer obtain and maintain full time employment CP 91. This condition is not authorized by statute and is not crime related. The court should strike it.

m. The requirement that Mr. Palmer pay counseling or therapy costs for A and P is properly addressed in a restitution order, not as a condition of community custody.

A condition orders that Mr. Palmer “[p]ay for all counseling services/therapy costs for your victims, which are incurred as a result of your offense.” CP 91. This is not authorized by statute and is properly addressed as restitution. RCW 9.94A.753. It should be stricken.

n. The condition requiring Mr. Palmer obtain permission before he visits or stays overnight at any residence other than his own is not crime related and is unconstitutionally overbroad.

The court ordered that Mr. Palmer “[m]ust obtain written permission from the Community Corrections Officer prior to visiting or staying overnight at any residence other than registered address.” CP 91. This condition is not sufficiently crime related. The offenses did not occur during visits at a neighbor’s or friend’s house. The condition is also not narrowly tailored to comply with Mr. Palmer’s constitutional right to freedom of association. See Matter of Brettell, 6 Wn. App. 2d 161, 169, 430 P.3d 677 (2018) (condition prohibiting association with known drug users was reasonably necessary so it did not violate right to freedom of association). It should be stricken or reformed.

o. The requirement that Mr. Palmer pay the costs of community custody should be stricken.

Mr. Palmer is indigent. CP 74. Although the trial court intended to waive all discretionary legal financial obligations based on its finding of indigency, CP 79, the judgment and sentence orders that Mr. Palmer pay supervision fees. CP 81, 90. The relevant statute provides that this is discretionary: “Unless waived by the court . . . the court shall order an offender to . . . [p]ay supervision fees as determined by the department.”). RCW 9.94A.703(2)(d) (emphasis added). For this reason, costs of community custody are discretionary and are subject to an ability to pay inquiry. State v. Lundstrom, 6 Wn. App. 2d 388, 396 n.3, 429 P.3d 1116 (2018). The trial court, however, did not inquire into Mr. Palmer’s ability to pay. Consistent with the trial court’s intent to waive discretionary costs, this Court should strike the term. See State v. Ramirez, 191 Wn.2d 732, 742-46, 426 P.3d 714 (2018).

p. Remand is necessary to strike the interest accrual provision in the judgment and sentence.

The judgment and sentence, entered on August 17, 2018, provides that legal financial obligations shall bear interest. CP 80. Effective June 7, 2018, however, financial obligations excluding restitution no longer accrue interest. LAWS OF 2018, ch. 269, §§ 1-2; RCW 3.50.100(4)(b); Ramirez, 191 Wn.2d at 747. Accordingly, this Court should order the trial

court to strike the interest accrual provision. See Ramirez, 191 Wn.2d at 749-50.

F. CONCLUSION.

For the foregoing reasons, the Court should reverse Mr. Palmer's convictions and remand for a new trial. If not, this Court should provide Mr. Palmer the sentencing relief he requests.

Respectfully submitted this 22nd day of July, 2019.

/s Richard W. Lechich
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Washington Appellate Project - #91052
Attorney for Appellant

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

STATE OF WASHINGTON,)	
)	
RESPONDENT,)	
)	
v.)	NO. 52362-1-II
)	
MICHAEL PALMER,)	
)	
APPELLANT.)	

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