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NO. 53343-0-II

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

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STATE OF WASHINGTON,

Respondent,

v.

TOMÁS MANUEL GASPAR,

Appellant.

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

The Honorable Monty D. Cobb, Judge

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BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. A sexual assault nurse examiner offered improper, prejudicial opinion testimony, denying the appellant a fair trial on the charges related to complainant A.B.

2. Defense counsel was ineffective for failing to object to the nurse's testimony.

3. Prosecutorial misconduct in closing argument denied the appellant a fair trial on all counts.

4. Defense counsel was also ineffective for failing to object to the prosecutor's misconduct.

5. Cumulative error denied the appellant a fair trial on all counts.

6. The community custody condition ordering penile plethysmograph (PPG) testing "at a frequency"<sup>1</sup> established by the community corrections officer, or Department of Corrections policy, is unconstitutional and unauthorized by law.

7. The community custody condition limiting the appellant's internet access is not crime related, and therefore unauthorized by law.

8. The trial court erred in requiring the appellant to pay interest on non-restitution legal financial obligations (LFOs).

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<sup>1</sup> CP 59.

Issues Pertaining to Assignments of Error

1. A sexual assault nurse examiner testified regarding one of three complainants that she suffered from “toxic stress” based on the appellant’s sexual abuse, that this led to poor emotional regulation, which in turn led to cutting behavior, for which there was no other explanation.

a. As to the charges related to complainant A.B., did the nurse’s testimony constitute improper, prejudicial opinion testimony as to the appellant’s guilt, which may be raised for the first time on appeal as manifest constitutional error?

b. In failing to object to the nurse’s improper opinion testimony, did defense counsel provide the appellant ineffective assistance, denying him a fair trial?

2. In closing, the prosecutor committed misconduct, shifting the State’s burden to the defense by suggesting there was additional evidence that the rules of evidence prevented the jury from hearing. The prosecutor also improperly bolstered the complainants’ statements to the nurse by suggesting that, based on the rules of evidence, statements made to medical providers are more reliable as a matter of law.

a. Were these two lines of argument, which were not objected to, incurably prejudicial as to all charges?

b. In failing to object to such misconduct, did defense counsel again provide the appellant ineffective assistance, denying him a fair trial on all charges?

3. Based on the foregoing errors, did cumulative error deny the appellant a fair trial on each charge?

4. Is the community custody condition ordering PPG testing at the direction of the community corrections officer, or per Department of Corrections policy, unconstitutional and unauthorized by law?

5. Should the community custody condition limiting internet access be stricken because it is not crime related?

6. Did the trial court err in requiring the appellant to pay interest on non-restitution LFOs?

B. STATEMENT OF THE CASE

1. Gaspar is accused.

Tomás Manuel Gaspar's daughter and two granddaughters, all similar ages, accused him of sexual abuse. RP 143-45, 148, 166, 169-70, 177-78. As to each complainant, the State charged Gaspar with child rape and incest occurring between May 1, 2017 and March 21, 2018. The girls were between 11 and 13 during the charging period. CP 7-11.

2. Trial testimony by complainants and their mothers

Trial occurred in March of 2019. A.B., Gaspar's daughter, then in eighth grade, testified that Gaspar began having sexual contact with her when she was in first grade. RP 144, 149. She last had sexual contact with her father the summer between sixth and seventh grade. RP 145, 150. She thought she was about 12 at the time. RP 145. She testified he put his penis in her vagina. RP 144.

A.B. and complainant L.S. drew pictures of people having sex, which the police found at Gaspar's residence. RP 117, 122, 148, 169-70.

A.B. didn't tell her mother for a long time. RP 148. Gaspar told A.B. not to tell or he would go to jail. RP 148.

A.B.'s mother Theresa C. testified A.B. had weekend visits with Gaspar. RP 134. Theresa noticed a change in A.B.'s behavior. RP 135. A.B. was withdrawn and cut herself. RP 136. Theresa took A.B. to counseling. RP 135. A.B. disclosed abuse to her counselor. RP 135.

According to the investigating detective, A.B.'s family reported that A.B.'s step-grandfather had also sexually abused A.B. RP 127, 210-11. However, according to the detective, the family did not want him investigated, so police did not follow up. RP 127. The step-grandfather was providing childcare to A.B. until shortly before her disclosures. RP 210-11 (testimony of nurse examiner).

Gaspar's adult daughter Sebastiana M. also testified. She is the mother of complainants R.S. and L.S. In March of 2018, when R.S. was 11 years old, she disclosed sexual abuse by Gaspar, saying she was "tired" of the things he did to her. RP 157. Sebastiana's older daughter L.S., who was then 13, also disclosed abuse. RP 155, 157. Sebastiana had noticed defiant behavior by both girls, but she attributed it to their ages. RP 157.

L.S. testified she used to visit Gaspar at his residence and sometimes spent the night. RP 164, 174. He tried to put his penis in her vagina, but it only went in partway. RP 165-66. It hurt. RP 168. Gaspar also put his mouth on her vagina. RP166-67. The last time such contact occurred was early 2018. RP 173.

R.S. testified that Gaspar tried to put his penis in her vagina. RP 178, 181. She did not recall how much it went in, but it did *not* hurt. RP 178. She did not specify when the contact occurred.

### 3. Trial testimony by nurse examiner

Lisa Wahl, a nurse practitioner who conducted sexual assault exams at the local child advocacy center, also testified. RP 185. She testified one in five girls and one in 10 boys are sexually abused by the age of 18. RP 188-89. Disclosure rates are relatively low, particularly while the abuse is ongoing. RP 189. Wahl testified at length regarding factors affecting the probability of disclosure, including whether the abuse is one-time or

ongoing, the age of the child, the relationship between child and offender, and the child's concern that the child or others will be harmed. RP 189.

Wahl testified that by the time children come in for an exam, she has watched their forensic interview. But rather than confronting them with information from the interview, she asks them to describe what happened to them using an anatomical chart. RP 199. All three complainants were interviewed and examined by Wahl.

Wahl testified that L.S. reported attempted penile-anal penetration, penile-oral penetration, and penile-vaginal penetration, with ejaculation onto her labial folds. RP 206. Gaspar reportedly threatened harm to L.S. if she told anyone. RP 206. The last contact reportedly occurred in early March of 2018, a month before Wahl saw L.S. RP 207.

R.S. reported penile-vaginal penetration and ejaculation onto her leg. RP 207. Gaspar gave her candy as an enticement. RP 207. She did not say when the contact occurred. RP 207.

Wahl's lengthiest testimony related to A.B. A.B. demonstrated a "flat" affect. RP 194. She appeared "shut down" and "clearly guarded." RP 194. A.B. appeared to be experiencing "internal duress." RP 194.

Wahl characterized the abuse of A.B. as occurring during "half her life," or since she was six years old. RP 194. Wahl reported that A.B. described several forms of sexual contact including penile-vaginal and

penile-oral penetration. RP 195, 199. A.B. described sexual acts in terms of things that “usually” or “sometimes” happened. RP 194. According to Wahl, “these are terms that come out when a child has had so many sexual experiences with the perpetrator that they’ve blurred[.]” RP 194.

The prosecutor also asked Wahl what happens to children who experience trauma. RP 201. Wahl testified that sexual abuse, and efforts to keep it secret, affect children:

You either use enticements or you use threats. So, for [R.S.], she was given candy. For [L.S.], she was told that if she tells he’ll go to jail and her mother will hit her more. For [A.B.], she was told that he’ll go to jail. Now, why would that matter to [A.B.]? *Well, he’s her father and she loves him. And children love their parents, they’re like right and left arms. You can’t sever that relationship; they’re the first people that a child knows and loves. And to then put that burden of her father will go to jail if she tells shifts the onus of responsibility onto the child’s back and off of the perpetrator’s back.*

*And so now we’re talking about toxic stress, bearing that burden for six years until [A.B.] disclosed.*

RP 202 (emphasis added).

Toxic stress affects brain development and the ability to emotionally regulate oneself. RP 203-04. Specifically, in A.B.’s case, she had experienced “permanently permanent physiologic as well as psychologic change in these neuropathways.” RP 204.

After Wahl's long response—comprising three full transcript pages—defense counsel finally objected on relevancy grounds. RP 204. The court sustained the objection, stating, “it's getting rather narrative.” RP 204.

The prosecutor then asked Wahl whether the processes she had described would lead to self-harming behavior. RP 204. Wahl responded,

A. Yes. So, self-harm is a direct example of poor coping mechanisms from [an] emotionally dysregulated child who is having an inability to self sooth, self-regulate, and adjust to what's happened to her. So she's going to self-harm is one classic example.

Q. Okay. Have you ever seen children engage in what they call cutting before?

A. Yes.

Q. Is that a typical response to molestation . . . and/or child rape?

A. Yes.

RP 204-05. Wahl later testified on redirect examination that she was aware of no other reason besides sexual abuse that A.B. would cut herself. RP 215-16. The prosecutor highlighted Wahl's testimony about A.B.'s cutting behavior in closing argument. RP 252.

#### 4. State's closing argument

In closing, the prosecutor also argued the mothers' testimony regarding the girls' pre-disclosure behavior was important, considering

Wahl's testimony. RP 246. The prosecutor acknowledged that the girls were reluctant to talk about the allegations in court. He argued this was understandable; the courtroom setting was intimidating. RP 246-47.

The prosecutor also argued the State only needed to prove the elements of the crime. RP 249. The State argued that this was due in part to the fact that the court was obliged to exclude certain evidence:

*The State doesn't have to, you know, to prove that someone had red hair, or that, you know, a host of things. It might come up in your head during deliberations and you say, well, why didn't the State prove this? Why didn't the State prove this? Well, there's lots of reasons. Part of it has to do with what evidence is allowed into the case. Some evidence is excluded because of hearsay, which is completely understandable. I mean, when the [c]ourt excludes evidence it's all for a good reason.*

RP 249-50 (emphasis added). Defense counsel did not object.

The prosecutor returned to the topic of the girls' in-court reticence. PR 250. But the girls had disclosed to Wahl. Indeed, they were more likely to disclose fully to her. The prosecutor explained:

*So, you saw their reluctance in this case to talk about it. Well, then you heard from Lisa Wahl. Now, when they talked to Lisa Wahl they were sitting there with, you know, basically one-on-one[.] But they're sitting and they're comfortable and they're talking, and they're much more likely to disclose at that point. And Lisa Wahl took this information for the purpose of a medical diagnosis. So, what the kids told her, it was very important that it be true and accurate because that's the—for instance, on the hearsay rule, one of the exceptions is that the physician-patient conversation. Since . . . the statements are made for the*

*purpose of medical diagnosis and treatment people tend to be much more honest when they talk about what happened to them, because it's important that the doctor realize what's going on, to accurately help them. So, people tend to be much more accurate when they talk to a doctor. And that was what this was about. It wasn't the police gathering evidence; it wasn't anything else; it was just a person, a nice lady, talking to them about what had happened to them. And they disclosed fully.*

RP 250-51 (emphasis added).

5. Verdicts and sentencing, including community custody conditions

A jury found Gaspar guilty of two counts of second degree child rape<sup>2</sup> as to A.B. and L.S., and one count of first degree child rape<sup>3</sup> as to R.S. CP 36, 38, 40. Gaspar was also convicted of three counts of first degree incest,<sup>4</sup> one for each complainant. CP 37, 39, 41.

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<sup>2</sup> Under RCW 9A.44.076(1)

A person is guilty of rape of a child in the second degree when the person has sexual intercourse with another who is at least twelve years old but less than fourteen years old and not married to the perpetrator and the perpetrator is at least thirty-six months older than the victim.

<sup>3</sup> Under RCW 9A.44.073(1)

A person is guilty of rape of a child in the first degree when the person has sexual intercourse with another who is less than twelve years old and not married to the perpetrator and the perpetrator is at least twenty-four months older than the victim.

<sup>4</sup> Under RCW 9A.64.020(1)(a)

A person is guilty of incest in the first degree if he . . . engages in sexual intercourse with a person whom he . . . knows to be related

The court sentenced Gaspar to concurrent prison terms on each count, the longest of which was 318 months to life in prison for first degree child rape. CP 49. Accompanying the child rape prison terms was lifetime community custody. CP 50.

As a condition of community custody, the court ordered that Gaspar “undergo . . . periodic polygraph and/or [PPG] testing to measure treatment progress and compliance at a frequency determined by [his] Sexual Offender Treatment provider (SOTP), [Community Corrections Officer (CCO)] or [Department of Corrections (DOC)] policy.” CP 59 (condition 8).

Further, the court ordered—over defense objection<sup>5</sup>—that Gaspar “shall not use or access the internet (including through cellular devices, electronic tablets, video game consoles, TV’s [sic], ETC [sic]) or any other computer modem without the presence of a responsible adult who is aware of the conviction, and the activity has been approved by the CCO and the [SOTP] in advance[.]” CP 59 (condition 10).

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to him . . . , either legitimately or illegitimately, as an ancestor, descendant, brother, or sister of either the whole or the half blood.

<sup>5</sup> RP 294.

Among LFOs, the court imposed only the mandatory \$500 victim penalty assessment<sup>6</sup> and \$100 DNA database fee,<sup>7</sup> waiving all others. CP 51. But the judgment and sentence also requires that Gaspar pay interest on all LFOs. Specifically, it states

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.

CP 52.

Gaspar timely appeals. CP 65.

C. ARGUMENT

1. NURSE WAHL'S TESTIMONY ABOUT A.B.'S BEHAVIORS AND STATEMENTS CONSTITUTED AN IMPROPER OPINION ON GUILT, IN VIOLATION OF THE CONSTITUTION. COUNSEL'S FAILURE TO OBJECT TO SUCH TESTIMONY WAS, MOREOVER, INEFFECTIVE.

Nurse Wahl's testimony regarding A.B.'s behaviors—specifically, that A.B. suffered from toxic stress *based on her father's abuse*, that this led to poor emotional regulation, which in turn led to cutting behavior for which there was no other explanation—constituted an improper and unconstitutional opinion on guilt. Further, Wahl testimony that A.B.'s use of “sometimes” and “usually” terms indicated that A.B. had had so many

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<sup>6</sup> RCW 7.68.035

<sup>7</sup> RCW 43.43.7541

sexual experiences with the perpetrator (clearly Gaspar) that they blended together also crossed the line into forbidden territory. Defense counsel's failure to object to such testimony was, moreover, ineffective. For both reasons, Gaspar's conviction as to A.B. should be reversed.

a. Wahl's testimony constituted an improper opinion on guilt.

Nurse Wahl's testimony constituted an improper opinion on guilt. As a preliminary matter, Gaspar acknowledges that his attorney inadequately objected to Wahl's testimony. See RP 204 (relevance objection three pages into narrative response). However, under RAP 2.5(a)(3), Gaspar may raise the issue for the first time on appeal because it is a "manifest error affecting a constitutional right."

Testimony that is an "explicit" or "near-explicit" opinion on guilt may be an error of constitutional magnitude, which may be raised for the first time on appeal under RAP 2.5(a)(3). State v. Kirkman, 159 Wn.2d 918, 936, 155 P.3d 125 (2007). And, recently, in State v. A.M., \_\_\_ Wn.2d \_\_\_, 448 P.3d 35, 38-39 (2019), the Supreme Court re-addressed the threshold determination of whether RAP 2.5(a)(3) permits review of an error affecting a constitutional right that was not preserved by objection in the court below. There, the Court held that an appellant need only make a plausible showing that the error has had practical and identifiable consequences at trial. Id. at 38. This is a distinct standard from the review

of the alleged constitutional violation itself, because RAP 2.5 “serves a gatekeeping function” rather than a vehicle for analysis of the error itself. A.M., 448 P.3d at 38-39 (citing State v. Lamar, 180 Wn.2d 576, 583, 327 P.3d 46 (2014)). For the reasons explained below, Gaspar can meet this standard.

Turning to the substance of the issue, in Washington, the role of the jury is to be held “inviolable.” CONST. art. I, § 21; accord U.S. CONST. amend. VI. The jury’s fact-finding role is essential to the constitutional right to trial by a jury of one’s peers. Sofie v. Fibreboard Corp., 112 Wn.2d 636, 656, 771 P.2d 711 (1989).

No reliable test for truthfulness exists, such that a witness is not qualified to judge the truthfulness of a child’s story. United States v. Azure, 801 F.2d 336, 341 (8th Cir. 1986); State v. Dunn, 125 Wn. App. 582, 594, 105 P.3d 1022 (2005). Expressions of personal belief as to guilt are “clearly inappropriate.” State v. Montgomery, 163 Wn.2d 577, 591, 183 P.3d 267 (2008). “Such testimony is unfairly prejudicial to the defendant because it invades the exclusive province of the jury.” Kirkman, 159 Wn.2d at 927.

On the other hand, experts are permitted to testify on subjects that are not within the understanding of the average person. Montgomery, 163 Wn.2d at 590 (citing ER 702; State v. Petrich, 101 Wn.2d 566, 575-76, 683 P.2d 173 (1984)). Experts may express opinions concerning their fields of

expertise when those opinions will assist the trier of fact. Montgomery, 163 Wn.2d at 590 (citing ER 702; ER 701). “The mere fact that an expert opinion covers an issue that the jury has to pass upon does not call for automatic exclusion.” Montgomery, 163 Wn.2d at 590.

In determining whether a statement constitutes constitutionally improper opinion testimony, rather than permissible opinion testimony, this Court considers the type of witness involved, the specific nature of the testimony, the nature of the charges, the type of defense, and the other evidence before the trier of fact. Id. at 591. With that in mind, there are some areas of inquiry that are clearly inappropriate for opinion testimony in criminal trials, even by experts. Among these areas are opinions, particularly expressions of personal belief, as to the guilt of the defendant, the intent of the accused, or the veracity of witnesses. Id. (citing State v. Demery, 144 Wn.2d 753, 759, 30 P.3d 1278 (2001) (plurality opinion); Kirkman, 159 Wn.2d at 927; State v. Farr-Lenzini, 93 Wn. App. 453, 463, 970 P.2d 313 (1999)).

As Gaspar will demonstrate, Wahl’s testimony falls within constitutionally improper opinion testimony under Montgomery and its predecessors. With the girls’ reticence at trial, nurse Wahl became the state’s star witness: Whereas the complainants’ testimony regarding sexual activity was terse, Wahl relayed the girls’ allegations in far more detail. E.g.

RP 194-95. She offered her opinion that A.B. had been abused, and that Gaspar was the perpetrator. RP 194-95, 202-05, 215-16. Touching on an aspect of Gaspar's defense, she testified A.B. suffered from physiological manifestations of sexual abuse by *Gaspar* and not another family member who had apparently also abused A.B., but who was not investigated. RP 202-04. Wahl's testimony was not permissible expert opinion. Instead, her testimony crossed the line into opinion that Gaspar was guilty of the crimes against A.B. This is never appropriate. Montgomery, 163 Wn.2d at 591.

Wahl's testimony was strikingly similar to an expert's improper testimony State v. Florczak, 76 Wn. App. 55, 882 P.2d 199 (1994). There, Division One of this Court concluded the trial court did not err when it admitted an expert social worker's testimony that the child molestation complainant suffered from post-traumatic stress disorder (PTSD). Id. at 74. But error *did* occur when that same expert testified the child's PTSD was "secondary . . . to sexual abuse." Id. By claiming her diagnosis was "secondary to sexual abuse," the expert rendered an opinion of ultimate fact that the child had, in fact, been sexually abused. Id.; see also State v. Black, 109 Wn.2d 336, 341, 745 P.2d 12 (1987) (reversing rape conviction based in part on improper expert testimony that "[t]here is a specific profile for rape victims and [the complainant] fits in"); State v. Fitzgerald, 39 Wn. App. 652, 657, 694 P.2d 1117 (1985) (trial court erred in permitting

physician to offer opinion that the complainants had been molested; convictions reversed on other grounds).

Unlike Black, in which the appellate court reversed, the Florczak court did not ultimately reverse because the error was deemed harmless beyond a reasonable doubt. Florczak, 76 Wn. App. at 75.

But here, as to A.B., Wahl's testimony was even worse: Wahl testified terms that A.B.'s use of "always" and "sometimes language" meant that sexual activity with "the perpetrator" occurred so constantly that the experiences blended together. RP 194. Wahl explicitly testified that that A.B. suffered from toxic stress *based on her father's abuse*. RP 202. During her long narrative response, Wahl testified in somewhat general terms, but then concluded that this led A.B., specifically, to suffer from poor emotional regulation. RP 202-04. Wahl continued that "self-harm is a direct example of poor coping mechanisms from [an] emotionally dysregulated child who is having an inability to self sooth, self-regulate, and adjust to what's happened to *her*. So *she's* going to self-harm is one classic example." RP 204 (emphasis added). On redirect examination, Wahl made it clear that the "she" in question was A.B., and that there was no other explanation for A.B.'s cutting behavior. RP 215-16.

Significantly, A.B. had also made allegations against another individual, but Wahl clearly opined that the source of the "toxic stress" was

A.B.'s father's—Gaspar's—abuse. RP 202. In context, it was also clear that in Wahl's statement, "these are terms that come out when a child has had so many sexual experiences with the perpetrator that they've blurred," the "perpetrator" was indeed Gaspar. RP 194.

Under Florczak, Black, and the factors set forth Montgomery and its predecessors, therefore, Wahl's testimony was an improper opinion on guilt, and a violation of Gaspar's constitutional right to trial by jury. Here, then, two questions remain: First, whether Gaspar can make a "plausible showing" that the error had consequences at trial, making it manifest constitutional error, and second, whether the State can demonstrate that the constitutional error was harmless beyond a reasonable doubt. The answer to the first is yes. The answer the second is no, because the error was not harmless beyond a reasonable doubt.

As for the first question, Florczak is again instructive. There, the court held that because Florczak and his co-defendant were implicated as the possible abusers, the social worker's testimony also amounted to an opinion that they were guilty, either individually or jointly, of sexually abusing the complainant. Such testimony invaded the province of the jury and was therefore was manifest constitutional error. Florczak, 76 Wn. App. at 74 (finding error to be manifest but concluding that error was harmless).

The result is no different under the “plausible showing” test. A.M., 448 P.3d at 38. For example, A.B.’s brief and relatively vague account was bolstered by Wahl’s testimony that A.B. was frequently and severely abused *by her father*, and it was this abuse that led to cutting. Thus, despite the somewhat typical lack of physical evidence of sexual abuse,<sup>8</sup> the State highlighted A.B.’s cutting as evidence that her father abused her. RP 252. This record satisfies the RAP 2.5 standard under A.M., 448 P.3d at 38-39.

As for the second question, the error was not harmless beyond a reasonable doubt. Constitutional error is harmless only if the State can demonstrate that the untainted evidence is so overwhelming that it necessarily supports a guilty verdict. State v. Barr, 123 Wn. App. 373, 384, 98 P.3d 518 (2004) (citing State v. Guloy, 104 Wn.2d 412, 426, 705 P.2d 1182 (1985)).

A federal appellate case, Azure, 801 F.2d 336, is instructive in this respect. There, a pediatrician offered his opinion as to the truth of the child sexual abuse complainant’s account. Id. at 339-40. The appellate court emphasized that by allowing the pediatrician to put his stamp on the child's

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<sup>8</sup> RP 211-13 (confirmation by Wahl on cross-examination that none of the girls’ genitalia manifested physical signs of sexual abuse; acknowledging, in any event, that A.B. declined a genital examination).

story, he essentially told the jury that the defendant was the person who sexually abused the complainant. But, meanwhile,

[n]o reliable test for truthfulness exists and [the pediatrician] was not qualified to judge the truthfulness of that part of [the child's] story. The jury may well have relied on his opinion and “surrender[ed] their own common sense in weighing testimony[.]”]

Id. at 341 (quoting United States v. Barnard, 490 F.2d 907, 912 (9th Cir.1973)). Considering that the erroneously admitted opinion likely bolstered the credibility of the key government witness, the federal appellate court deemed the error reversible even though the evidence was otherwise *sufficient* to support the conviction. Azure, 801 F.2d at 341.

Here, A.B. provided a brief and relatively vague account of abuse by her father. RP 142-49. She was also vague on the timing of the abuse, providing several different estimates regarding the last time sexual contact of any kind occurred. E.g. RP 143 (estimating last sexual contact occurred two and a half years before trial, i.e., the fall of 2016, well before the charging period); RP 144-45 (testimony that sexual contact last occurred in sixth grade, or during 2016-2017 school year; A.B. was in eight grade 2018-2019 school year).

Gaspar offered evidence that that A.B. was abused by another relative. RP 127. According to Wahl, A.B.'s self-harm was the product of sexual abuse. RP 204-05. And Wahl testified that the psychological and

physical effects she observed were caused by *Gaspar's* abuse of A.B., not that of another relative. RP 200-04, 215-16. The objectionable testimony seriously undermined the defense theory. RP 259 (defense closing argument). For this reason, as well, admission of the opinion testimony cannot be considered harmless beyond a reasonable doubt.

As for another potential line of defense, the State arguably presented some evidence that the abuse happened when A.B. was 12—which the jury was required to find in order to convict Gaspar of second degree rape. CP 27 (instruction 13); see State v. Hickman, 135 Wn.2d 97, 102, 954 P.2d 900 (1998) (State assumes the burden of proving otherwise unnecessary elements of the offense when such added elements are included without objection in the “to convict” instruction).<sup>9</sup> But there was other evidence suggesting that the abuse happened before her birthday, when A.B. was less than 12. Relatedly, there was evidence that any contact occurred outside the charging period, an explicit defense at trial.<sup>10</sup> Compare RP 143 (last sexual contact happened two and a half years before trial, or late 2016) with

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<sup>9</sup> Gaspar is aware of cases stating that a defendant may be convicted of a lesser degree of child rape even if the evidence is ambiguous as to the child's age, and the child may have been younger at the time of prohibited act. E.g. State v. Smith, 122 Wn. App. 294, 299, 93 P.3d 206 (2004). However, these cases do not discuss the Hickman doctrine as it applies to this case. More significantly, the jury here would not have been aware of such cases—and here, the instruction required the jury to find that A.B. was 12 or older.

<sup>10</sup> RP 259 (defense closing argument).

RP 150 (A.B. last *saw* Gaspar between sixth and seventh grade). But Wahl testified that A.B. utilized terms indicating that the abuse *by her father* was constant. RP 194. This bolstered the State's theory regarding the timing of sexual contact, shoring up A.B.'s vague testimony. Under the circumstances, the State cannot demonstrate the jury's decision-making on each element was unaffected by the improper opinion testimony.

In summary, because the unconstitutional opinion testimony was both manifest error and not harmless beyond a reasonable doubt, this Court should reverse Gaspar's convictions relating to A.B., which are both based on the same underlying conduct.

- b. Alternatively, defense counsel was ineffective for failing to object to nurse Wahl's improper opinion testimony.

Gaspar was also denied his right to the effective assistance of counsel when defense counsel failed to object to nurse Wahl's improper opinion testimony. As to the convictions related to A.B., reversal is required for this reason as well.

Under article 1, section 22 of the state constitution and the Sixth Amendment, every accused person is guaranteed the right to the effective assistance of counsel. Strickland v. Washington, 466 U.S. 668, 685-86, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); State v. Thomas, 109 Wn.2d 222, 229, 743 P.2d 816 (1987). "A claim of ineffective assistance of counsel is an

issue of constitutional magnitude that may be considered for the first time on appeal.” State v. Kylo, 166 Wn.2d 856, 862, 215 P.3d 177 (2009).

A person asserting ineffective assistance must show (1) his counsel’s performance fell below an objective standard of reasonableness and, if so, (2) that counsel’s poor performance prejudiced him. State v. A.N.J., 168 Wn.2d 91, 109, 225 P.3d 956 (2010) (citing Strickland, 466 U.S. at 687; State v. McFarland, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995)). This Court reviews claims of ineffective assistance de novo, as they present mixed questions of law and fact. A.N.J., 168 Wn.2d at 109.

With respect to the deficient performance prong, “[t]here is a strong presumption that defense counsel’s conduct is not deficient,” but an accused rebuts that presumption if “no conceivable legitimate tactic explain[s] counsel’s performance.” State v. Reichenbach, 153 Wn.2d 126, 130, 101 P.3d 80 (2004). To meet the prejudice prong, an accused person must show a reasonable probability “based on the record developed in the trial court, that the result of the proceeding would have been different but for counsel’s deficient representation.” McFarland, 127 Wn.2d at 337. The test for “reasonable probability” of prejudice is whether it is reasonably probable that, without the error, at least one juror would have reached a different result. Wiggins v. Smith, 539 U.S. 510, 537, 123 S. Ct. 2527, 156 L. Ed. 2d 471 (2003)

Relevant to both prongs, if a claim of ineffective assistance is based on a failure to object, the accused must show that the objection would have been successful. State v. Crow, 8 Wn. App. 2d 480, 508, 438 P.3d 541, review denied, 449 P.3d 664 (2019).

Counsel's failure to object to Wahl's improper and prejudicial opinion testimony was unreasonably deficient. Legitimate trial strategy or tactics may constitute reasonable performance. State v. Aho, 137 Wn.2d 736, 745, 975 P.2d 512 (1999). But there was no possible strategic reason not to object to such damaging testimony. Counsel did eventually object, albeit on relevance grounds. RP 204. But counsel could have—and should have—objected much sooner.

As to A.B. at least, the defense theory appears to have been that she was abused by someone else and that the State could not prove the relevant sexual activity occurred during the charging period. RP 259 (closing argument). Wahl's inappropriate opinion testimony that A.B. was an abuse victim, and that *Gaspar* was A.B.'s abuser, eviscerated the defense. Moreover, a targeted objection to such clearly inappropriate testimony would have succeeded. See Crow, 8 Wn. App.2d at 508 (holding that objection to improper profile testimony would have succeeded).

For the reasons stated on pages 19-22 above, Gaspar has also shown prejudice as to A.B. Wahl testified A.B. used terms indicating that the abuse

was constant. This bolstered the State's theory regarding the timing of sexual contact, shoring up the State's case. Again, Wahl testified that the psychological and physical effects she observed were caused by *Gaspar's* abuse of A.B., not that of another relative, seriously undermining the defense.

Because Gaspar has demonstrated both deficient performance and prejudice, his convictions related to A.B. must be reversed.

2. PROSECUTORIAL MISCONDUCT IN CLOSING ARGUMENT DENIED GASPAR A FAIR TRIAL ON ALL COUNTS. DEFENSE COUNSEL'S FAILURE TO OBJECT TO SUCH TESTIMONY WAS, MOREOVER, INEFFECTIVE.

As shown, reversal is required on the counts involving A.B. based on nurse Wahl's improper opinion testimony. But prosecutorial misconduct in closing argument also denied Gaspar a fair trial on *all* counts. The prosecutor committed misconduct—shifting the State's own burden to the defense—by suggesting there was additional evidence that the rules of evidence prevented the jury from hearing. Further, the prosecutor improperly bolstered Wahl's account of the complainants' statements by suggesting that statements made to medical providers are more reliable *as a matter of law*. This assertion also raises the specter of judicial comment on the evidence, which is explicitly forbidden under the state constitution.

Defense counsel's failure to object to such testimony was, moreover, ineffective. Reversal is required on all counts.

- a. Prosecutorial misconduct in closing argument denied Gaspar a fair trial.

The right to a fair trial is a fundamental liberty guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and article 1, section 22 of the state constitution. In re Pers. Restraint of Glasmann, 175 Wn.2d 696, 703, 286 P.3d 673 (2012), cert. denied, 136 S. Ct. 357 (2015). To prevail on a claim of prosecutorial misconduct, a defendant must show that the prosecutor's conduct was both improper and prejudicial. State v. Emery, 174 Wn.2d 741, 756, 278 P.3d 653 (2012). Prejudice is established by showing a substantial likelihood that the misconduct affected the verdict. Id. at 760.

If the accused does not object at trial, he is deemed to have waived objection, unless the prosecutor's misconduct is "so flagrant that no instruction could cure it." State v. Case, 49 Wn.2d 66, 72, 298 P.2d 500 (1956). An accused person cannot demonstrate misconduct where a curative instruction could have cured any error and alleviated any prejudice. State v. Walker, 164 Wn. App. 724, 737, 265 P.3d 191 (2011), adhered to on remand, noted at 173 Wn. App. 1027 (2013). But an objection is unnecessary in cases of incurable prejudice because "there is, in effect, a

mistrial and a new trial is the only and the mandatory remedy.” Emery, 174 Wn.2d at 762 (quoting Case, 49 Wn.2d at 74).

Thus, “[m]isconduct is to be judged not so much by what was said or done as by the effect which is likely to flow therefrom.” Emery, 174 Wn.2d at 762 (citing State v. Navone, 186 Wash. 532, 538, 58 P.2d 1208 (1936)). Reviewing courts, therefore, focus less on whether the prosecutor’s misconduct was flagrant or ill-intentioned and more on whether the resulting prejudice could have been cured. Emery, 174 Wn.2d at 762. “The criterion always is, has such a feeling of prejudice been engendered or located in the minds of the jury as to prevent a [defendant] from having a fair trial?” Id. (quoting Slattery v. City of Seattle, 169 Wash. 144, 148, 13 P.2d 464 (1932)).

In addition, appellate courts recognize that the cumulative effect of repetitive prejudicial prosecutorial misconduct may create a situation in which no instruction or series of instructions can erase the combined prejudicial effect. Walker, 164 Wn. App. at 737 (citing Case, 49 Wn.2d at 73).

In closing argument, a prosecutor is permitted to argue reasonable inferences from the evidence at trial. Glasmann, 175 Wn.2d at 704. But a prosecutor still must “seek convictions based only on probative evidence

and sound reason.” Id. (quoting State v. Casteneda-Perez, 61 Wn. App. 354, 363, 810 P.2d 74 (1991)).

i. *The two forms of misconduct*

Here, the prosecutor violated, in two ways, the directive that argument must be based on the evidence and the applicable law. First, the prosecutor shifted the burden to the defense by suggesting that if the jury had doubts about the State having proven its case, the doubts should be resolved in favor of the State, because the rules of evidence did not allow all the evidence to come in. The prosecutor stated, “It might come up in your head during deliberations and you say, well, why didn’t the State prove this? Why didn’t the State prove this? Well, there’s lots of reasons. Part of it has to do with what evidence is allowed into the case.” RP 249. The prosecutor then specifically mentioned the rule excluding hearsay. RP 249.

It is flagrant misconduct to shift the burden of proof to the accused. State v. Miles, 139 Wn. App. 879, 890, 162 P.3d 1169 (2007) (citing State v. Stenson, 132 Wn.2d 668, 727, 940 P.2d 1239 (1997)). Further, “[a] person being tried on a criminal charge can be convicted only by evidence, not by innuendo.” State v. Yoakum, 37 Wn.2d 137, 144, 222 P.2d 181 (1950).

Shifting the burden of proof to the defendant is improper, and ignoring this prohibition may amount to flagrant and ill-intentioned

misconduct. Glasmann, 175 Wn.2d at 713 (citing State v. Fleming, 83 Wn. App. 209, 213-14, 921 P.2d 1076 (1996); Casteneda-Perez, 61 Wn. App. at 362-63)). Due process requires the prosecution to prove, beyond a reasonable doubt, every element of the charged crimes. Glasmann, 175 Wn.2d at 713 (citing In re Winship, 397 U.S. 358, 361, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970)). Misstating the basis on which a jury can acquit insidiously shifts the requirement that the State prove the defendant's guilt beyond a reasonable doubt. Glasmann, 175 Wn.2d at 713 (citing Fleming, 83 Wn. App. at 213).

In addition, a prosecutor may not ask questions implying facts detrimental to the accused “as a guise for submitting to the jury substantive evidence that is otherwise unavailable.” State v. Babich, 68 Wn. App. 438, 444, 842 P.2d 1053 (1993) (quoting United States v. Silverstein, 737 F.2d 864, 868 (10th Cir.1984)).

Here, admittedly, the prosecutor was not specific about the unavailable evidence. But his argument, while less specific, was broadly damaging—it suggested that doubts resulting from lack of evidence should not be resolved in favor of the defense but rather the State. This undermines fundamental due process principles. Glasmann, 175 Wn.2d at 713; see also State v. Castle, 86 Wn. App. 48, 59, 935 P.2d 656 (1997) (“*Certainly* reasonable doubt can arise from a lack of evidence[.]”) (Emphasis added).

Second, compounding that line of argument, the prosecutor implied that the complainants' statements to a medical provider were reliable as a matter of law, bolstering the credibility of both the complainants' statements to Wahl, as she presented them, and their in-court testimony. The prosecutor argued that while hearsay is generally prohibited

one of the exceptions is . . . the physician-patient conversation. [Because] the statements are made for the purpose of medical diagnosis and treatment people tend to be much more honest when they talk about what happened to them.

RP 250-51. The prosecutor then argued the girls "disclosed fully" to "nice lady" Wahl. RP 251.

Thus, the prosecutor (who had already highlighted the rules of evidence by suggesting that they prevented the jury from hearing certain evidence) suggested that these very rules—in essence, the court system—treated statements to medical providers as more reliable than other kinds of evidence. Therefore, presumably, the girls' statements to Wahl were credible. This also offered to jurors, backhandedly, the court's imprimatur.

It is improper for a prosecutor to personally vouch for a witness's credibility. State v. Brett, 126 Wn.2d 136, 175, 892 P.2d 29 (1995), cert. denied, 516 U.S. 1121 (1996). Improper vouching generally occurs if the prosecutor (1) expresses his or her personal belief as to the veracity of the witness or (2) indicates that evidence not presented at trial supports the

witness's testimony. United States v. Brooks, 508 F.3d 1205, 1209 (9th Cir.2007) (quoting United States v. Hermanek, 289 F.3d 1076, 1098 (9th Cir.2002)).

Here, the prosecutor's argument was arguably worse than either traditional form of vouching because the prosecutor placed upon Wahl's testimony the imprimatur of the judicial system itself. It is a well-settled rule that counsel's statements to the jury upon the law must be limited to the law as set forth in the court's instructions to the jury. State v. Perez-Cervantes, 141 Wn.2d 468, 475, 6 P.3d 1160 (2000); State v. Estill, 80 Wn.2d 196, 199, 492 P.2d 1037 (1972). But the rules of evidence are not explained in the jury instructions. There is a good reason for this—such an explanation would only confuse the jury. Indeed, jurors are instructed in every civil and criminal case that evidentiary rulings are for the trial court and the jury is not to be concerned with the reasons for those rulings. E.g. 11 WASHINGTON PRACTICE: WASHINGTON PATTERN INSTRUCTIONS: CRIMINAL 1.02, & notes on use (4th ed. 2016) (WPIC); see CP 13 (instruction 1).

Here, the prosecutor claimed that the law allows the jury to hear such statements because “people tend to be much more honest when they talk about what happened to them.” RP 251. This was an incorrect statement of law that improperly, and misleadingly, emphasized the

trustworthiness of the statements admitted under the medical treatment hearsay exception.

The medical treatment hearsay exception applies to an out-of-court statement only insofar as it is “reasonably pertinent to diagnosis or treatment.” ER 803(a)(4); In re Pers. Restraint of Grasso, 151 Wn.2d 1, 19-20, 84 P.3d 859 (2004) (plurality opinion). The reason behind the exception to the hearsay rule is not that the statement is deemed reliable. Instead, the evidence is admissible—and justifies an exemption from the preferred system of cross-examination and direct confrontation—based upon circumstantial evidence of its trustworthiness. White v. Illinois, 502 U.S. 346, 355 n. 8, 357, 112 S. Ct. 736, 116 L. Ed. 2d 848 (1992). But, even though the rules of evidence carve out an exception based on these general principles, testimony admitted under the medical hearsay exception is not intrinsically more reliable than any other testimony.

Relatedly, in Washington, a core principle of jurisprudence is that “[j]udges shall not charge juries with respect to matters of fact, nor comment thereon, but shall declare the law.” CONST. art. 4, §16. The purpose of article 4, section 16 “is to prevent the jury from being influenced by knowledge conveyed to it by the court as to the court’s opinion of the evidence submitted.” Seattle v. Arensmeyer, 6 Wn. App. 116, 120, 491 P.2d 1305 (1971) (quoting Heitfeld v. Benevolent & Protective Order of

Keglers, 36 Wn.2d 685, 699, 220 P.2d 655 (1950)). A comment on the evidence occurs when it appears that the court's attitude toward the merits of the cause are reasonably inferable from the nature or manner of the court's statements. State v. Carothers, 84 Wn.2d 256, 267, 525 P.2d 731 (1974).

Concomitantly, jurors are considered the sole judges of the weight to apply to evidence and the credibility of witnesses. "It is error for the court to single out any particular witness or class of witnesses and comment either favorably or unfavorably as to the weight or credibility to be accorded to their testimony." Otter v. Dep't of Labor & Indus., 11 Wn.2d 51, 57, 118 P.2d 413 (1941); see also State v. Alvis, 70 Wn.2d 969, 975-76, 425 P.2d 924 (1967) (holding that it is an improper comment on the evidence—a violation of article 4, section 16—to instruct the jury in any manner that conveys a personal opinion or view of the trial court regarding the credibility, weight, or sufficiency of some evidence introduced at trial).

Here, considering that the jury was instructed that the court is the source of evidentiary rulings, the prosecutor's remarks created an impression that the court itself considered the complainant's statements to Wahl inherently reliable.

The State's argument also conflicted with the court's instructions that the jury is the sole judge of the weight to apply to the evidence and that it must disregard rulings on evidence admissibility. CP 13-14 (instruction 1). The argument was, therefore, confusing to the jury. The rule restricting argument to the facts in evidence and the applicable law is intended to prevent such jury confusion. Perez-Cervantes, 141 Wn.2d at 474.

As shown, therefore, the State committed misconduct by suggesting inadmissible evidence supported its case and vouching for the trustworthiness of the complainants' statements to Wahl.

ii. *The resulting prejudice*

Although there was no objection, the prosecutor's misconduct was incurable prejudicial.

When the prosecution argues an incorrect statement of the law that conflicts with the court's instructions, and the defendant is prejudiced, reversal may be warranted. State v. Davenport, 100 Wn.2d 757, 675 P.2d 1213 (1984). Considered in tandem, the State's arguments created incurable prejudice. First, the prosecutor suggested that there was additional incriminating evidence, but it could not be presented due to the rules of evidence. Lack of evidence, then, did not lead to reasonable doubt, but rather further supported guilt. This shifted the burden of proof to Gaspar, in violation of due process. Continuing the State's misuse of the

rules of evidence, the prosecutor then suggested that each complainant's statements to Wahl met a gold standard of reliability under the rules of evidence. A curative instruction was unlikely to fix the lasting impression of such faulty argument: Although the court could have reminded jurors that the prosecutor's argument was not evidence, such a curative instruction could not erase the premise that the evidence (properly before the jury) was considered more valuable and more reliable by the courts.<sup>11</sup>

This was as inappropriate as any judicial comment on the evidence, and it was likely to have influenced the jury's verdicts. In essence, the State told the jury that the girls' statements to a medical provider were deemed reliable as a matter of law. This was crucial to securing convictions. The complainants' in-court testimony was terse and somewhat vague regarding the types of activity that occurred. But Wahl's testimony about their allegations was more detailed. And the jury was told that such statements are considered reliable as a matter of law.

For example, the State charged Gaspar with child rape, not molestation. Under RCW 9A.44.073(1) (first degree) and RCW

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<sup>11</sup> The State may argue that the rationale behind the medical hearsay exception would constitute a permissible line of argument. For example, a prosecutor might argue that—in general—patients hope to get better, so it makes sense they would disclose to medical professionals. However, any such an argument may be accomplished without reference to the rules of evidence, which, as shown, should play no part in the jury's consideration of evidence.

9A.44.076(1) (second degree), a person is guilty of child rape when the person, who is a certain age, has sexual intercourse with another, who is a certain age. Under RCW 9A.44.010, “[s]exual intercourse”

(a) has its ordinary meaning and occurs upon any penetration, however slight, and

(b) Also means any penetration of the vagina or anus however slight, by an object, when committed on one person by another, whether such persons are of the same or opposite sex, except when such penetration is accomplished for medically recognized treatment or diagnostic purposes, and

(c) Also means any act of sexual contact between persons involving the sex organs of one person and the mouth or anus of another whether such persons are of the same or opposite sex.

The jury appeared to have reservations about the type of contact that had occurred. See CP 35 (deliberating jury’s inquiries asking court to provide further definition of “female sexual organ” and whether touching of outer portion of labia constituted penetration); see also RP 259-61 (closing argument asserting defense that State had not proven penetration versus mere sexual touching).

Although Washington courts hold that any penetration of the female sex organ, including external structures, constitutes “sexual intercourse,” some *penetration*, rather than mere sexual contact, is required. State v. Weaville, 162 Wn. App. 801, 813, 256 P.3d 426 (2011) (citing RCW 9A.44.010(1)). “Penetration” is not defined within chapter 9A.44 RCW.

Weaville, 162 Wn. App. 813-14. Based on its ordinary meaning, “[p]enetration” is defined as “the act or process of penetrating,” which is in turn defined as “having the power of entering, piercing, or pervading.” Id. at 14 (citing Webster’s Third New Int’l Dictionary 1670 (2002)). Similarly, “penetrate” is defined as “to pass into or through.” Weaville, 162 Wn. App. 814 (citing Webster’s at 1670).

L.S. testified that Gaspar “tried” to put his penis in her vagina. RP 166. In contrast, Wahl testified L.S. had relayed that several forms of penetration occurred. RP 206.

R.S., the youngest complainant, *denied* she and Gaspar “ha[d] sex.” RP 178. Then she testified that the penis went in, and it did not hurt. RP 178. In response to the question, “So, do you recall the last time that you and your grandpa had sex?,” R.S. responded “[n]o.” RP 179. In contrast, Wahl testified that R.S. “described penile-vaginal penetration.” RP 207.

And Wahl’s testimony regarding A.B.’s statements, more in-depth and detailed than own A.B.’s testimony, is set forth above. See RP 194-95, 199 (abuse of A.B. occurred during “half her life;” A.B. described several forms of sexual contact including penile-vaginal and penile-oral penetration; A.B. described sexual acts in terms of things that “usually” or “sometimes” happened which are “terms that come out when a child has

had so many sexual experiences with the perpetrator that they've blurred[.]”).

As shown, the jury appeared to have reservations about whether the reported sexual activity met the elements of the offenses. The prosecutor's improper arguments—suggesting to jurors that any lack of evidence should not be held against the State and informing them that the complainants' statements to Wahl were considered reliable as a matter of law—helped bolster the State's case to the detriment of the defense. The cumulative effects of both forms of misconduct denied Gaspar a fair trial on all charges.

b. Alternatively, counsel was ineffective for failing to object to the prosecutor's misconduct.

Alternatively, defense counsel was ineffective for failing to object to the improper arguments. As stated above, an individual asserting ineffective assistance must show (1) counsel's performance fell below an objective standard of reasonableness and, if so, (2) that counsel's poor performance prejudiced him. A.N.J., 168 Wn.2d at 109.

With respect to the deficient performance prong, an accused person rebuts the presumption of competent representation if “no conceivable legitimate tactic explain[s] counsel's performance.” Id. Although counsel's decisions are given deference, conduct for which there is no legitimate strategic or tactical reason is constitutionally inadequate.

McFarland, 127 Wn.2d at 335. Purportedly “tactical” or “strategic” decisions by counsel must still be reasonable. Roe v. Flores-Ortega, 528 U.S. 470, 481, 120 S. Ct. 1029, 145 L. Ed. 2d 985 (2000). To meet the prejudice prong, an accused person must show there is reasonably probable that, without the error, at least one juror would have reached a different result. Wiggins, 539 U.S. at 537.

Gaspar satisfies both requirements. There was no valid strategic reason to fail to object to the prosecutor’s arguments. Considering the limitations of the complainants’ trial testimony, Wahl’s testimony was at the forefront of the State’s case. Any objection could not have highlighted her testimony any more than had already occurred. More damaging than her testimony was the State’s claim that such testimony was considered reliable as a matter of law. And, as stated, this argument was legally unsupportable. Thus, an objection was likely to have succeeded. And, for the reasons explained above at pages 34-38, the argument was prejudicial and likely to have affected the outcome of trial on each count.

Because counsel’s failure to object the misconduct was both deficient and prejudicial, reversal as to all counts is required.

3. BASED ON THE FOREGOING, CUMULATIVE ERROR DENIED MR. GASPAR A FAIR TRIAL.

The cumulative effect of the foregoing errors—the improper admission of opinion testimony, as well as the State’s misconduct in closing also denied Gaspar a fair trial. See State v. Venegas, 155 Wn. App. 507, 228 P.3d 813 (2010) (where errors occurred in admission of evidence and in closing argument, finding that “[e]ach of these errors was significant, and we believe that their cumulative impact on Venegas’s trial was severe enough to warrant reversal of her convictions under the cumulative error doctrine.”). Moreover, misconduct—even if it is not objected to—is properly considered in evaluating whether cumulative error denied an accused a fair trial. Venegas, 155 Wn. App. at 526; see also State v. Gorman-Lykken, 9 Wn. App. 2d 687, 703 n. 3, 446 P.3d 694 (2019) (Melnik, J., concurring).

For this reason, as well, this Court should reverse each of Gaspar’s convictions.

4. THE COMMUNITY CUSTODY CONDITION ORDERING PENILE PLETHYSMOGRAPH TESTING AT THE DIRECTION OF THE COMMUNITY CORRECTIONS OFFICER OR PER DEPARTMENT OF CORRECTIONS POLICY IS UNCONSTITUTIONAL AND UNAUTHORIZED BY LAW.

The condition regarding PPG testing requires in part that Gaspar submit to PPG testing whenever—“at a frequency”—directed by his CCO, or as dictated by DOC “policy.” CP 59 (condition 8). This condition is unconstitutional insofar as Gaspar may be subjected to PPG testing solely at the direction of DOC. The condition must be modified to respect Gaspar’s constitutional rights and to clarify that such testing may only be ordered for treatment reasons, rather than as a routine monitoring tool.

“Conditions of community custody may be challenged for the first time on appeal and, where the challenge involves a legal question that can be resolved on the existing record, [before enforcement].” State v. Wallmuller, \_\_\_ Wn.2d \_\_\_, 449 P.3d 619, 621 (2019) (citing State v. Padilla, 190 Wn.2d 672, 677, 416 P.3d 712 (2018)). A constitutional challenge to a condition of community custody is subject to de novo review. Wallmuller, 449 P.3d at 621. This Court should strike a community custody condition if it is manifestly unreasonable. State v. Sanchez Valencia, 169 Wn.2d 782, 791-92, 239 P.3d 1059 (2010).

The condition that Gaspar submit to PPG is not among the mandatory, waivable, or discretionary conditions of community custody listed in RCW 9.94A.703. Nor is it found in RCW 9.94A.704, which lists conditions that may be imposed by the DOC. A trial court may, however, require an offender to undergo testing to assure compliance with the conditions of community custody. State v. Acevedo, 159 Wn. App. 221, 233, 248 P.3d 526 (2010) (upholding requirement that defendant submit to polygraph and/or urinalysis testing to ensure compliance with other community custody conditions); State v. Combs, 102 Wn. App. 949, 952-53, 10 P.3d 1101 (2000) (polygraph testing may be used to monitor compliance with other conditions); State v. Parramore, 53 Wn. App. 527, 531-32, 768 P.2d 530 (1989) (upholding urinalysis to monitor the defendant's illegal drug use as part of sentence for delivery of marijuana).

But unlike polygraph and urinalysis testing, PPG testing is extraordinarily invasive: It involves the restraint and monitoring of an intimate part of a person's body while the mind is exposed to pornographic imagery. In re Marriage of Parker, 91 Wn. App. 219, 223-24, 957 P.2d 256 (1998). Such examination implicates the due process right to be free from bodily restraint. Id. at 224; see U.S. CONST. amend. XIV; CONST. art. 1, § 3.

Such testing is “extremely intrusive” and can be ordered only as part of crime-related treatment by a qualified provider. State v. Land, 172 Wn. App. 593, 605, 295 P.3d 782 (2013). Such testing is not considered a routine monitoring tool subject only to a CCO’s discretion. Id. While the condition superficially references treatment, the requirement that Gaspar submit to PPG testing at a frequency dictated by the CCO, or DOC policy, is untethered from treatment considerations, and violates his constitutional right to be free from bodily intrusions.

In State v. Johnson, 184 Wn. App. 777, 781, 340 P.3d 230 (2014), this Court “affirmed” a related condition but offered the necessary caveat that “the CCO’s scope of authority is limited to ordering plethysmograph testing for the purpose of sexual deviancy treatment and not for monitoring purposes.” Id.

Then, in an unpublished opinion issued after Johnson, this Court again “affirmed” a PPG condition. But this Court made it clear that clarification of the judgment and sentence was necessary, as follows:

Accordingly, we affirm the trial court’s imposition of condition 19, *with the clarification that the CCO has authority to order plethysmograph testing only for purposes of sexual deviancy treatment.* We also direct the State to provide a copy of this portion of the opinion to [the Department of Corrections] and the CCO.

State v. Bernarde, noted at 184 Wn. App. 1057, 2014 WL 6975858, at \*5-6 (2014) (emphasis added).<sup>12</sup>

Here, as written, the community custody condition permits Gaspar to be subjected to PPG solely at the direction of DOC or its employees. Consistent with this Court’s reasoning in Bernarde, this Court should order this illegal condition modified to protect Gaspar’s constitutional rights.

5. THE INTERNET-RELATED CONDITION MUST BE STRICKEN BECAUSE IT IS NOT CRIME RELATED.

The internet-related condition must be stricken because it is not crime related. CP 59 (condition 10).

Gaspar objected to the condition. RP 294. Whether the sentencing court had statutory authority to impose a community custody conditions is a question of law that is reviewed de novo. State v. Armendariz, 160 Wn.2d 106, 110, 156 P.3d 201 (2007).

RCW 9.94A.703 lists conditions of community custody, some mandatory, some waivable. Internet use is not expressly listed. RCW 9.94A.703. However, a court may impose other “crime-related prohibitions” beyond those specifically listed. RCW 9.94A.703(3)(f).

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<sup>12</sup> Pursuant to RAP 10.8 and GR 14.1, the appellant respectfully cites this unpublished decision as nonbinding authority, to be accorded such persuasive value as this Court deems appropriate

A condition is “crime-related” only if it “directly relates to the circumstances of the crime.” RCW 9.94A.030(10). The condition need not be causally related to the crime, but it must be directly related to the crime. State v. Zimmer, 146 Wn. App. 405, 413, 190 P.3d 121 (2008). Thus, crime-related conditions of community custody must be supported by evidence showing the factual relationship between the crime punished and the condition imposed. Parramore, 53 Wn. App. at 531. Substantial evidence must support a determination that a condition is crime related. State v. Motter, 139 Wn. App. 797, 801, 162 P.3d 1190 (2007), overruled on other grounds, Sanchez Valencia, 169 Wn.2d 782.

State v. O’Cain, 144 Wn. App. 772, 774, 184 P.3d 1262 (2008), is instructive. There, the trial court ordered an offender convicted of second degree rape to refrain from using the internet without the prior approval of his CCO. On appeal, Division One noted that no evidence in the record suggested that the defendant used the internet to commit his crime or that his internet use had contributed to the crime in any other way. Id. at 775. The O’Cain court remanded the case to the trial court with an order to strike the condition based on the lack of the requisite nexus between the crime and the prohibited activity. Id.

This Court, holding the trial court exceeded its sentencing authority, did the same in Johnson, 180 Wn. App. at 331. As in O’Cain and Johnson,

there was no evidence in this case the internet played a role in the charged crimes. Under those cases, this Court should remand for the condition to be stricken.

As a final matter, should, for some reason, this Court find that the condition is permissible under the statutes, it nonetheless suffers from an additional infirmity. It infringes upon protected First Amendment speech and is unconstitutionally overbroad. E.g., *Packingham v. North Carolina*, \_\_\_ U.S. \_\_\_, 137 S. Ct. 1730, 1735, 198 L. Ed. 2d 273 (2017).

But an appellate court will not decide a constitutional issue when the case can be decided on other grounds, *State v. Tingdale*, 117 Wn.2d 595, 599, 817 P.2d 850 (1991), and the condition must be stricken for the sole reason that it is not crime-related.

6. THE PROVISION IMPOSING INTEREST ON ALL LEGAL FINANCIAL OBLIGATIONS MUST BE STRICKEN FROM GASPAR'S JUDGMENT AND SENTENCE.

The provision of the judgment and sentence imposing interest on LFOs is contrary to recent statutory amendments and must be stricken.

Sentencing errors may be challenged for the first time on appeal. *State v. Bahl*, 164 Wn.2d 739, 744, 193 P.3d 678 (2008) (citing *State v. Ford*, 137 Wn.2d 472, 477, 973 P.2d 452 (1999)).

Engrossed Second Substitute House Bill 1783, 65th Leg., Reg. Sess. (Wash. 2018) (HB 1783), which became effective June 7, 2018, modified

Washington’s system of LFOs, addressing “some of the worst facets of the system that prevent offenders from rebuilding their lives after conviction.” State v. Ramirez, 191 Wn.2d 732, 747, 426 P.3d 714 (2018).

Among other changes, HB 1783 eliminates interest accrual on the nonrestitution portions of LFOs. Laws of 2018, ch. 269, § 1 (amending RCW 10.82.090). See Ramirez, 191 Wn.2d at 747.

Thus, RCW 10.82.090 requires the sentencing court to impose interest on restitution. RCW 10.82.090(1). But, following the changes made by HB 1783, the statute now provides that “[a]s of June 7, 2018, no interest shall accrue on nonrestitution legal financial obligations.” RCW 10.82.090(1).

The provision of Gaspar’s judgment and sentence requiring payment of interest, entered after June 7, 2018,<sup>13</sup> violates this provision of the amended statute.

This Court should remand with instructions to modify the judgment and sentence to strike the provision imposing interest on non-restitution LFOs.

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<sup>13</sup> Ramirez, in any event, holds that the changes effected by HB 1783 apply prospectively to cases not yet final on appeal. Ramirez, 191 Wn.2d at 747.

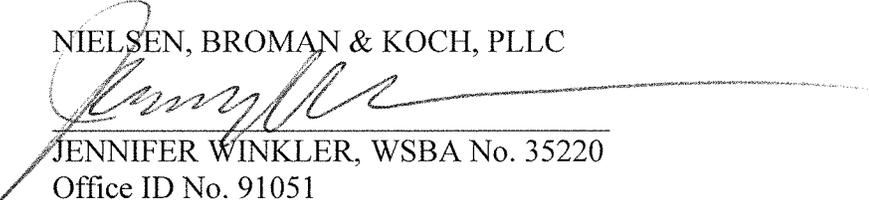
D. CONCLUSION

This Court should reverse both convictions related to A.B. based on nurse Wahl's improper and prejudicial opinion testimony. Moreover, prosecutorial misconduct—and cumulative error—requires reversal of the remaining counts. In addition, the challenged community custody conditions must be stricken or modified. Finally, the provision requiring Gaspar to pay interest on all legal financial obligations should be stricken as contrary to the law.

DATED this 15<sup>th</sup> day of November, 2019.

Respectfully submitted,

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