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COURT OF APPEALS, DIVISION II
CORTNY RAY SCOTT,
APPELLANT,
v.
STATE OF WASHINGTON,
RESPONDENT.

Appeal from the Superior Court of Thurston County, Washington
The Honorable Erik D. Price, Cause No. 17-1-01790-34

OPENING BRIEF OF APPELLANT

By
Barbara Corey
Attorney for Appellant
WSB #11778

902 South 10th Street
Tacoma, WA 98402
(253) 779-0844

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A. ASSIGNMENTS OF ERROR

1. The State's failure to preserve potentially exculpatory evidence denied defendant his right to due process and a fair trial.
2. Defense counsel failed to provide constitutionally effective assistance of counsel throughout the trial.
 - (a) Trial counsel failed to present a cohesive theory of the case, presenting a theory of the case in opening statement and then abandoning it to the prejudice of the defendant;
 - (b) Defense counsel failed to interview the teen-age complaining victims in a sex case and his pretrial interview of their mother was inadequate;
 - (c) Defense counsel's closing argument misstated the law, egregiously mis-stated the evidence, causing the court to reprimand counsel before the jury, excuse the jury from the courtroom, impose sanctions upon counsel, and cause a change of defense counsel during closing argument, all of which resulted in defense counsel's loss of credibility before the jury.
3. The trial court erred when it found that defense counsel had violated an order on motion in limine prohibiting questioning of TRM about allegations of sexual abuse by her biological father when defense counsel referred to later TRM's spontaneous statement to a question asked by the deputy prosecutor that her biological father had sexually assaulted her when there was no objection to that question, no motion to strike, and the statement remained in the record for the jury to consider as part of the evidence in the case.
4. The trial court's comment to the jury to disregard evidence that was properly in the record for the jury to consider was an unconstitutional comment on the evidence that was prejudicial to defendant requires reversal.
5. The State failed to prove the charges beyond a reasonable doubt.

6. This matter must be remanded to the superior court for correction of the judgment and sentence.
7. Defendant is entitled to relief under the cumulative error doctrine.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR:

1. Where the State failed to preserve potentially exculpatory evidence for defendant, defendant was denied the protections of the Fourteenth Amendment of the United States Constitution and Wash. Const., Art. 1, sec.
2. Defendant was denied his constitutional right to effective assistance of counsel under the Sixth Amendment to the United States Constitution and Wash. Const. Art. I, sec. 22.
3. The trial court misapplied the law when it instructed the jury to disregard evidence that came into the record from a witness's spontaneous comment and was not objected to, was not subject to a motion to strike, and therefore remained in the record for the jury to consider as part of the evidence in the case.
4. The trial court violated Wash. Const. Art. IV, sec. 16 when it unconstitutionally commented on the evidence during closing argument thereby presumptively prejudicing defendant's right to trial by jury.
5. The State denied defendant the constitutional protections of the Fourteenth Amendments and Wash. Const. Art 1, sec. 3, when it failed to prove all of the elements of every charge beyond a reasonable doubt, thereby denying him unanimous verdicts on each count.
6. Where the judgment and sentence contains error of law, this court must remand for correction thereof.
7. Cumulative error denied defendant his right to due process under the Fourteenth Amendment and Wash. Const. Art. 1, sec. 3.

C. STATEMENT OF THE CASE

1. Procedural Facts.

The State of Washington charged the defendant Cortny Ray Scott in the third amended information with count 1, rape of a child in the second degree [victim SNM, alleged to have been committed on 10/5/17]; count 2, rape of a child in the second degree [victim SNM, alleged to have been committed between 6/1/17 and 10/4/17]; count 3, rape of a child in the second degree [victim SNM, alleged to have been committed between 6/1/17 and 10/4/17]; count 4, rape of a child in the second degree [victim SNM, alleged to have been committed between 6/1/17 and 10/4/17]; count 5, child molestation in the first degree [victim TRM, alleged to have been committed between 5/1/14 and 12/17/14]; count 6, child molestation in second degree [victim TRM, alleged to have been committed between 12/18/14 and 12/17/16]; count 7, rape of a child in the second degree [victim TRM, alleged to have been committed between 12/18/14 and 12/17/16]; count 8, rape of a child in the second degree [victim TRM, alleged to have been committed between 12/18/14 and 12/17/18]; count 9, rape of a child in the second degree [victim TRM, alleged to have been committed between 12/18/14 and 12/17/18]; count 10, rape of a child in the second degree [victim TRM, alleged to have been committed between 12/18/14 and 12/17/18]. CP 96. The State alleged aggravating circumstances on every count. CP 177-180.

Defendant's date of birth is January 31, 1986. RP 911.

Trial commenced on May 20, 2019. RP 5/20/19 4.

In pretrial motions, defendant moved to suppress photos allegedly of text messages from victim's cell phone. RP 1/7/195. The basis for the motion was that police looked at the phone, took photos of a couple of text messages but not all of them, but did not take the phone into evidence. *Id.*

One of the officers asserted that there were "several messages" but these had not been preserved or otherwise described. *Id.* Defendant moved to exclude mention of these alleged messages. *Id.*

Defendant argued that failure to preserve the phone violated CrR 4.7(d), which addresses material held by others and provides that the prosecuting attorney shall attempt to cause such material or information to be available to the defendant. *Id.* Defendant had asked more than once to examine the phone but the State had not produced it. *Id.* Defendant denied sending any text messages and defendant challenged the authenticity of the text messages. *Id.* The State's failure to provide this discovery was prejudicial to defendant. *Id.* Defendant wanted to have a forensic expert look at the phone because it was the only way to challenge the validity of the calls. RP 117/19 11. An expert would be able to determine whether the phone messages on the victim's phone were sent from defendant's phone. *Id.* The court denied defendant's motion. RP 117/19 14.

Due to health concerns of counsel Floyd Chapman, attorney Fred Hetter associated to assist with the defense. RP 112.

The State objected to the defense asking TRM about her prior sexual experience. RP 162. Defendant sought to introduce prior allegations of sexual assault made by the alleged victim against her biological father for the same type of sexual conduct. RP 165-66. In that case, the alleged victim's mother previously had obtained an order for protection, which was followed by an investigation by DSHS against both the biological father and a stepbrother. RP 168. The State did not provide discovery on this to defense and so defense did not know what specific findings CPS made. RP 169.

Defense informed the court that it wanted to ask two questions: (1) Have you made prior sexual allegations? (2) To whom did you make those?" RP 170-71. The court denied defendant's motion to ask these questions of TRM or her mother. RP 191.

Defendant made a motion to introduce evidence that the alleged victims' mother had contacted police to report to that the alleged victims' biological father had molested the younger child, TRM. RP 5/23119 8-9.

The court file in Thurston County Family and Juvenile Court 07-2-30423-9 contained documents asserting that the mother, grandmother and child had discussed the sexual abuse and also stated that the stepson also had digitally penetrated the child. RP 5/23119 8-9. The defendant wanted to admit before the jury evidence that the alleged victim had previously been sexually abused by her father and her stepbrother. RP 5/23119 9. This testimony was relevant for the jury to consider when assessing her credibility as well as her sexual knowledge. RP 5/23119 9. These allegations were never investigated or prosecuted. RP 5/23/19 10-11. The court declined to admit the evidence, holding that it would simply encourage the jury to speculate as to whether those allegations were true or not. RP 5/23/19 10, 11

The trial court granted the State's motion to bifurcate deliberations, instructing the jury to deliberate first on whether or not the State had proven beyond a reasonable doubt that defendant committed the substantive offenses, and if the jury returned guilty verdicts on any of those ten counts, instructing the jury on the aggravating factors and sending them back to deliberate on whether the State had proven beyond a reasonable doubt that the aggravators were present. RP 1039-1041.

Closing arguments were held. Defense closing argument is discussed at length below in argument 2(c).

The jury convicted defendant on counts 1, child rape in the second degree; count 2, child rape in the second degree; count 4, child rape in the second degree; count 6, child molestation in the second degree; count 7, rape of a child in the second degree. CP 298, 299, 301, 303, 304. The jury acquitted defendant on the remaining five counts. CP 300, 302, 305, 306, 307. The jury then needed to determine whether the State had proven the aggravators for counts 1, 2, 4, and 7. The court instructed the jury on the aggravating circumstances. RP 1162-68. After closing arguments, the jury answered "yes" to all of the aggravators. CP 318,319,320,321.

The court sentenced defendant to 300 months in the Department of Corrections for counts 1,2,4 and 7, and 116 months for count 6. RP 1223; CP 390-405.

Defendant timely filed this appeal. CP 381 2.

2. Trial Testimony.

SNM., date of birth 11/02/04, lived with the defendant when her mother was married to him RP 5/23/19 43-44. She lived with her mother and her younger sister, TRM. RP 5/23/19 46. SNM told her mother that defendant had engaged in sexual intercourse with him because her mother was mad at defendant. RP 5/23/19 66. Her mother had told her that defendant was cheating on her and so SNM decided it would be a good time to tell her when the family was in the car together on October 6, 2017. RP 5/23/19 66-67. After they went to the grandmother's house, they went to the doctor to be checked. RP 5/23/19 67. SNM recalled that a police officer was present. RP 5/23/19 67.

SNM believed that the last incident of sexual intercourse occurred a week before she told her mom. RP 5/23/19 68. She alleged that she was on the couch in the living room and that defendant put on a condom and inserted his penis into her vagina. RP 5/23/19 68. She could not remember what defendant did with the condoms. RP 5/23/19 68-69.

SNM asserted that defendant "would do it in places out around the dining room, kitchen, or living room." RP 5/23/19 69. She remembered the first time she cried. RP 5/23/19 69. Her vagina would send stabbing pains though the rest of her body. RP 5/23/19 70. These incidents almost always happened when SNM.' s mother and sister were sleeping. RP 5/23/19 76. SNM contended that defendant had sexual intercourse with her in her mother's bed a few times, estimating between one and five times. RP 5/23/19 78.

SNM acknowledged difficulty in recalling specific incidents because of the passage of two years of time. RP 5/23/19 79. The incident sort of blurred together in her mind. *Id.* She was unable to recall dates. *Id.*

TRM, the older sister, was 16 years old when she testified. RP 5/23/19 119. She attended special needs classes because of problems with reading, math, and "it takes me longer to think

about things." RP 5/23/19 121. She described herself as "really slow" at those subjects. *Id.*

The deputy prosecutor used leading questions with this witness and defense counsel did not object. After she testified that timelines were not easy for her, the deputy prosecutor asked her, "Is it possible that it was more than a year [that defense resided with her and her sister and her mother]?" RP 5/23/19 123. When the prosecutor asked TRM whether and when she had seen pictures of one of the residences they had formerly lived in, TRM replied, "Yesterday." RP 5/23/19 123-24. However, the deputy prosecutor immediately asked her if that "could have been on Tuesday?" RP 5/23/19 124 TRM eagerly responded "yes, yes." *Id.*

TRM stated that the last time defendant sexually assaulted her in the kitchen was "a month *after* he got caught by what happened, *after* we left the house." RP 5/23/19 127.

TRM, date of birth 12/18/02, told her mother that defendant, who was married to her mother, had been engaging in sexual activities with her when she, mother, and her sister SNM were driving to her grandmother's house. RP 5/23/19 127. This occurred after her mother found out that defendant was seeing another woman. RP 5/23/19 127. TRM testified that defendant was having sex with her and doing sexual activities with her that's really all. RP 5/23/19 129. She said that she "didn't really describe it to her." *Id.*

Earlier in direct examination, TRM had described the sexual activities as "me playing with his penis and then sucking on his nipple, or he would make me suck his nipple, or I would have to -or he would put his penis in my vaginal hole." RP 5/23/19 127. When TRM described what the defendant had her do, she interposed that, "This is what my dad used to do." RP 130. The State did not object to this testimony which it had elicited during on direct examination. *Id.* Defense counsel did not follow up on this answer and it was not ever stricken from the record. Passim.

The deputy prosecutor's direct examination was rife with leading questions. For example, she asked TRM if at the Tolmie Cove house, the defendant instructed her on what to do. RP 5/23/19 133. TRM answered, "Uh, no. I don't think so, but I could be wrong." RP 5/23/18 133.

The deputy prosecutor's next question was leading, "Okay, did he ever tell you that you had to get a good grip on him?" RP 133. TRM answered, "Yes." *Id.* The deputy prosecutor then asked TRM to speculate when defendant meant by that and she responded, "He means that I had to give his penis a really good grip." RP 5/23/19 133. TRM thought that this occurred in the Tumwater house and she agreed with the deputy prosecutor that "it was fair" to say that the family lived in that house from around April of 2017 until October 6, 2017. RP 5/23/19 134.

On cross-examination, defense counsel failed to ask any questions about what TRM's dad had done to her. *Passim.* Defense counsel failed to ask any questions about whether TRM knew anything about SNM's allegations against defendant. *Passim.* TRM did testify that defendant had taken away her bed as punishment and that thereafter she had to sleep on the floor. RP 5/23/19 147. Defense counsel never followed up on this unusual claim when Wendy Scott, the mother, later testified. *Passim.*

Collette Petrino, a SANE nurse, had contact with SNM on October 6, 2017. RP 5/28/19 568-69, 574, 575. SNM told her that defendant had sex with her on October 5, 2017 (contrary to her earlier statements that the last event was a week prior to her telling her mother), that he wore a condom, and that he pulled it out after he ejaculated. RP 5/18/19 580. SNM also stated that there had been digital penetration. RP 5/28/19 582. They talked only about events on October 5, 2017. RP 5/28/19 583. The nurse also took swabs for potential evidence testing. RP 5/28/19 585, 591. She also placed into evidence underwear that had not been worn on the same day as the alleged sexual assault. RP 5/28/19 598. SNM had showered after the alleged sexual assault and had changed her clothing. *Id.* The underwear placed into evidence were not worn the day of the sexual assault. *Id.* In her physical exam of SNM, the nurse noted that SNM's hymen appeared normal. RP 5/28/19 610.

The State sent the vaginal swabs and underwear to the Washington State Patrol Crime Laboratory for DNA testing where they were tested by crime laboratory technician Laura Kelly. RP 884. Y-STR testing yielded the result that the material taken from vaginal swabs matched the sample taken from defendant and the frequency of this profile is not expected to occur more

frequently than one in 5,500 males in the U.S. population. RP 886.

Kelly testified that "it is not a unique Y-STR profile." RP 886-87. Y-STR profiles are not unique profiles to individuals. RP 887. All paternal relatives' male relatives share the same Y-STR profile. RP 887. When a match is declared between an unknown Y -STR profile and a profile developed from a known individual, not only is that individual included as a possible source of the male DNA found on the item, all of his paternal male relatives are as well. RP 887. In this case, Kelly could not testify whether defendant, his brother, father, male nephew was the person who provided the DNA. RP 887-88; 895-96. Kelly could only determine whether defendant could be included or excluded as a source. RP 888. Kelly could not obtain any profile from the perineal swabs. RP 888. The scientist performed no tests for presence of semen or any bodily fluids. RP 889-90.

Kelly conceded that she did not use using the standard DNA analysis testing and thus she did not find any match to defendant. RP 893. She was required to do the less probative test because of the poor quality of the evidence, that is, the quantity of female DNA overwhelmed the small amount of male DNA. RP 894. Kelly opined that it is possible that the male Y-STR DNA was transferred into the vaginal vault by the alleged victim herself using her own hand or other object. RP 897, 898.

Det. Tyler Boling of the Tumwater Police Department was assigned as the lead detective to investigate this case. RP 907. In the course of his investigation, he contacted SNM and asked to view messages on her cellphone. RP 921-22. When SNM showed him the messages she claimed defendant send, she said that he started out by writing out the messages with words telling her what to do. RP 89. SNM stated that defendant would tell her where to meet him in the house. RP 89. He took photos of only two messages that SNM identified as being sent by defendant. RP 922, 923. The defendant testified that he only photographed the messages that directed SNM to come to locations where she was then sexually assaulted. RP 922. The photos were admitted as exhibits 25 and 26. Exhibit 25 sets forth the date of September 6 or 8th, 2017 at 3: 19 a.m. RP 924. The sender was identified by SNM as defendant. *Id.*

According to the witness, there was no other part of the conversation that had any evidentiary value. *Id.* Exhibit 26 was a photo of a text message sent on September 30, 2017 at 5:36 a.m., that said, "Meet me at the freezer in two minutes." RP 924-25. Det. Boling never asked SNM if she ever used defendant's cell phone. RP 954. SNM stated that later on the defendant simply sent messages that just had periods in them, for example one message reportedly consisted of ".". RP 92-93.

When asked by the deputy prosecutor whether defendant had ever told her not to tell, SNM answered, "He -yeah, I believe he did." RP 96.

Det. Boling noted that the text messages came from someone who was labelled "dad" with the phone number that corresponded to a number he had for defendant. RP 925. Det. Boling did not interview anybody in this case. RP 925. Although alleged victim SNM contended that the sexual assault had occurred for years prior to her disclosure, not a single person had any suspicions that it was occurring. RP 940. The family lived in very close quarters and SNM contended that she was raped three to four times a week and she frequently bled as a result. RP 936-37. TRM also claimed to have bled. *Id.* The rapes allegedly occurred on blankets on the kitchen floor. RP 937. SNM contended that defendant always used condoms and lubricant. RP 939. The detective did not think to search to see if these items even existed. *Passim.* The detective testified that he looked for items in the living room. RP 941. He looked there and found nothing. RP 942.

Wendy Scott, mother of the alleged victims, testified that she sustained a leg fracture in January 2017 and was off from work until the end of June 2017. RP 721. She testified that she received Oxycodone to help her sleep but that it did not work for her. RP 756. She testified that she could not sleep and that she often woke up with shooting pains in her leg. 754, 756-57. She broke her leg again on September 12, 2017. RP 723. Defendant slept with her. RP 757.

They moved from the Tolmie Cove house into the Tumwater house in March 2017. RP 722. Scott left the defendant on October 6, 2017. RP 724.

The defense put on a case. RP 971.

Jennifer Junge testified that she had defendant started a relationship as a couple in January 2014, RP 971-72. They were both in an exclusive relationship. RP 979. They wanted a family and their first child was born on January 5, 2017. RP 972. The pregnancy was planned. RP 972-73. Ms. Junge and defendant saw each other every day, Monday through Friday. RP 973. They spent every night together at her house. 974-976. She did not learn of these allegations until defendant was arrested. RP 975. They did not see so much of each other on the weekends because defendant spent time helping his brother and going out with friends, but they frequently talked. RP 977.

Defendant had married Wendy Scott on April 4, 2016. RP 982.

Stephen Mulcock, the senior director of human resources at Alaffia in Tumwater, testified that defendant worked there during the period of time relevant to these charges. RP 1002 -1012. The warehouse where defendant worked is at 8109 River Drive SE, Olympia, Washington. RP 1008-09. Employees such as defendant clocked into work using a thumbprint activated time clock. RP 1006. They used the same system when leaving work at the end of the day. *Id* On October 5, 2017, defendant clocked into work at 6 a.m. RP 1008. He checked out in the afternoon at 1 :30 p.m. *Id.* On September 8, 2017, defendant clocked into work at 5:42 a.m. RP 1010.

Defendant also called Dr. Phillip David Welch, a physician specializing in obstetrics and gynecology. RP 1014. His practice is in Seattle at Swedish Hospital. *Id.* Dr. Welch had been asked to review the medical histories and colposcopic photographs from the sexual examinations of the alleged victim. RP 1016. In his review of the colposcopic photos of both alleged victims, ne did not see any abnormal findings. RP 1020. He did not see any visible or abnormal scarring. *Id.* In his medical opinion, after his review of the evidence, the photos and the medical record, he concluded that the evidence in this case was not consistent with sexual abuse. RP 1020.

D. LAW AND ARGUMENT

1. THE STATE FAILED TO PRESERVE POTENTIALLY EXCULPATORY EVIDENCE WHEN IT RELEASED SNM'S CELL PHONE THAT REPORTEDLY CONTAINED TEXTS THAT THE DEFENDANT SENT EVERY TIME HE WANTED TO HAVE SEX WITH HER WHEN THE DETECTIVE TOOK ONLY TWO PHOTOGRAPH OF TEXTS DATED LATE IN SEPTEMBER 2017, THEREBY DENYING DEFENDANT HIS CONSTITUTIONAL RIGHT TO EXAMINE THIS EVIDENCE AND PRESENT A DEFENSE.

The Fourteenth Amendment of the United States Constitution¹ and article I, section 32 of the Washington Constitution² require the State to preserve material exculpatory evidence in a criminal trial. *State v. Wittenbarger*, 124 Wn.2d 467, 474-75, 880 P.2d 517 (1994) (citing *California v. Trombetta*, 467 U.S. 479, 104 S. Ct. 2528, 81 L. Ed. 2d 413 (1984)). If the State fails to preserve material exculpatory evidence, the trial court must dismiss criminal charges. *Wittenbarger*, 124 Wn.2d at 475. The prosecutor has a duty to disclose and to preserve evidence that is material and favorable to the defendant. CrR 4.7(a)(3)³. *State v. Wittenbarger*, 124 Wn.2d at 475. To be material and exculpatory, the evidence possesses an exculpatory value apparent before it was destroyed and be of such a nature that that the defendant would be unable to obtain comparable evidence by any other reasonably available means. *Wittenbarger, Id.* The State's failure to disclose and preserve such evidence will generally be held to violate the accused's constitutional right to a fair trial. *State v. Mak*, 105 Wn.2d 692, 704, 8718 P.2d 407 (1986); *State v. Blackwell*, 120 Wn.2d 822, 826, 845 P.2d 1017 (1993).

¹ The Fourteenth Amendment to the United States Constitution provides: "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property without due process of law."

² Wash. Const, Art. I, sec 3, entitled "Personal rights", provides, "No person shall be deprived of life, liberty, or property without due process of law."

³ CrR 4.7(a)(3) states, "Except as otherwise provided as to protective orders, the prosecuting attorney shall disclose to defendant's counsel any material or information within the prosecuting attorney's knowledge which tends to negate defendant's guilt as to the offense charged."

Criminal Rule [CrR] 4.7(a)(1)(ii) requires the prosecuting attorney to disclose to the defendant prior to the omnibus hearing "any written or recorded statements ... made by the defendant."

In the instant case, alleged victim SNM had disclosed in pretrial statements to police that the defendant left text messages when he wanted her to meet him in the house for sex. RP 84. SNM also testified that over time defendant sent her more messages that simply contained a dot or a couple of dots. RP 86-87. Detective Boling testified that he reviewed SNM's cellphone and asked her about the defendant's alleged text messages. RP 921. She brought them up her text messaging profile and allowed him to have her phone. RP 921-22. He was able to go through the string of text messages from the defendant to her. RP 922. He did not take pictures of all the text messages in that string. RP 822. He testified that he just took pictures of the text messages that she had, "just the dot, dot, dot that was described to me." RP 922, Exhibit 25, dated September 6 or 6, 2018, at 3:19 a.m., and 26, dated September 30, 2017 at 4:31 a.m., were such photos. RP 923-24. There was another text dated September 30, 2017 that read, "Meet me at the freezer in two minutes." RP 925-26. He gave the phone back to SNM after he looked at it and took the two photos. RP 953-54. He did not ask any questions about whether Wendy Scott, SNM or TRM had access to defendant's phone. RP 954. He did not know, for example, that Wendy Scott had knew defendant's password to his phone and went on this phone, for example, to look at photos. RP 954. He acknowledged that anyone can send text messages from another's cell phone if they are on that cell phone. RP 954.

On cross-examination, Det. Boling acknowledged that the detective's job is to collect all the evidence that is relevant to the case. RP 934. He testified that "the only thing we don't normally take in an investigation would be garbage or something -- we can't book food into evidence, but anything that's related to crimes or something we believe is crimes, it would be taken." RP 934.

The State's response to defendant was that the State would prove the authenticity of the photos of the messages when the detective testified that the photos came from SNM's phone. RP 117/198. Further, the State contended that it did not have to produce the phone because the phone belonged to the victim who had privacy rights pursuant to RCW 7.90. RP 117/199.

RCW 7.90 addresses sexual assault protection orders and appears irrelevant to discovery issues in criminal trials.

The State simply denied that it had any obligation to preserve the phone for defendant's examination and review of messages it contained. The State is wrong. Defendant properly argued that the issue was whether or not the State had made a good faith effort to acquire the cell phone as required by CrR 4.7(d), given its initial failure to take this obvious piece of evidence into property. RP 1/7/19 10. Since defendant denied ever making any such phone calls, defense intended to have the phone examined by a forensic expert to determine the phone number from which the calls originated. RP 117/19 11. This examination and anticipated testimony would have been critical to establishing defendant's innocence.

Given the defense inability to examine the phone, the defense asked the court to suppress the evidence. *Id.*

The court denied the suppression motion because it had not been properly noted and counsel thereafter did not re-note it. RP 1/7/19 12-14; *passim*. The court held that it would be premature to rule on the motion to exclude reference to "several photographs" or "several messages." RP 117/19 15.

The State's failure to maintain SNM's phone in property when its materiality was so readily apparent from SNM's early statements so that defendant could have it examined by a forensic expert denied defendant his constitutional rights to due process and his right to defend against the nine class A felony sex charges and one class B felony sex charge.

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2. DEFENSE COUNSEL WAS INEFFECTIVE IN REPRESENTING DEFENDANT AND DENIED DEFENDANT HIS CONSTITUTIONAL RIGHTS TO COUNSEL UNDER THE SIXTH AMENDMENT TO THE UNITED STATES CONSTITUTION AND ARTICLE ONE, SECTION 22 OF THE WASHINGTON CONSTITUTION.

A criminal defendant has the right to effective of counsel. This right is guaranteed by the Sixth Amendment to the United States Constitution⁴ and Art. 1, sec. 22 of the Washington State Constitution⁵. In *Strickland v. Washington*, 466 U.S. 687,690, 104 S.Ct. 2052, 80 L.Ed.2d 180 (1984), the Court held that a criminal defendant must show both (1) deficient performance and (2) resulting prejudice to prevail on an ineffective assistance claim.

Washington follows the Strickland standard to determine whether the defendant had constitutionally sufficient representation. *State v. A.N.J.*, 168 Wn to have a .2d 91, 225 P.3d 956 (2010); *State v. Townsend*, 142 Wn.2d 838, 15 P.3d 145, 148 (2001); *State v. King*, 130 vVn.2d 517, 925 P .2d 606, 613 (1996),

Performance is deficient if it falls "below an objective standard of reasonableness based on consideration of all the circumstances." *State v. McFarland*, 127 Wn.2d 322, 334-35,899 P.2d 1251 (1995). Prejudice exists if there is a reasonable probability that "but for counsel's deficient performance, the outcome of the proceedings would have been different." *State v. Kylo*, 166 vVn.2d 856,862,215P.3d 177 (2009); *Strickland*, 466 U.S. at 694. The defendant must affirmatively prove prejudice and show more than a "'conceivable effect on the outcome" to prevail. *State v. Crawford*, 159 Wn.2d 86, 99, 147 P.3d 1288 (2006) (quoting *Strickland*, 466

⁴ The Sixth Amendment to the United States Constitutions states: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtained witnesses in his favor, and to have the Assistance of Counsel for his defence."

⁵ Wash. Const., Art. 1, sec. 22 provides in pertinent part: "In criminal prosecutions the accused shall have the right to appear and defend in person, or by counsel, to demand the nature and cause of the accusation against him, to have a copy thereof, to testify in his own behalf, to meet the witnesses against him face to face, to have compulsory process to compel the attendance of witnesses in his own behalf, to have a speedy public trial by an impartial jury of the count in which the offense is charged to have been charged and the right to appeal in all cases . . ."

U.S. at 693). At the same time, a "reasonable probability" is lower than a preponderance standard. *Strickland*, 466 U.S. at 694; *Jones*, 183 Wn.2d at 339. Rather, it is a probability sufficient to undermine confidence in the outcome. *Strickland*, 466 U.S. at 694.

Washington courts also indulge a strong presumption that counsel's representation was reasonable. *Kyllo*, 166 Wn.2d at 862. Performance is not deficient if counsel's conduct can be characterized as legitimate trial strategy or tactics. *Id.* at 863.

Finally, the *Strickland* court warned against mechanical application of these guidelines. It reminded that "a court should keep in mind that the stated principles do not establish mechanical rules [T]he ultimate focus of inquiry must be on the fundamental fairness of the proceeding whose result is being challenged. *Strickland*, 466 U.S. at 696. The *Strickland* court emphasized that the purpose of the effective assistance guarantee of the Sixth amendment is simply to assure that criminal defendants receive a fair trial. 466 U.S. at 689. Thus, the reviewing court considers not just *Strickland*'s basic test but also this guiding principle in its analysis. *State v. Estes*, 188 Wn.2d 450, 457-458, 395 P.3d 1095 (2017).

In the instant case, Scott did not receive effective assistance from trial counsel. Scott was charged with multiple class "A" felony child sex crimes, which carry life sentences as well as life time sex offender registration and supervision assuming release determined by the Indeterminate Sentencing Review Board [ISRB] from the Department of Corrections at some point, as well as class "B" felony child sex crimes also requiring sex offender registration for the statutory maximum terms and other conditions. His trial counsel appeared not to know how to prepare to try a child victim sex crimes case. The deficiencies trial counsel committed that prejudiced Scott and denied him a fair trial are set forth below.

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(a) Trial counsel failed to prepare a cohesive theory of the case, presenting a theory of the case in opening statement and then abandoning it thereafter, to the prejudice of defendant.

The Sixth Amendment and article I section 22 guarantee effective assistance of counsel. To establish a claim for ineffective assistance, counsel's performance must have been deficient, and the deficient performance must have resulted in prejudice, 466 U.S. at 687. "Deficient performance occurs when counsel's performance falls below an objective standard of reasonableness." *State v. Yarbrough*, 151 Wn. App. 66, 89, 210 P.3d 1029 (2009). If counsel's conduct demonstrates a legitimate strategy or tactic, it cannot serve as a basis for an ineffective assistance of counsel claim. *Id.* at 90. Prejudice occurs when, but for the deficient performance, there is a reasonable probability that the outcome [of trial] would have differed." *Id.*

The Washington Supreme Court has recognized that counsel's failure to follow up on promises to elicit certain evidence during opening statement is "quite serious." *State v. Greif*, 141 Wn.2d 910, 921, 10 P.3d 390 (2000). In *Greif*, defense counsel told jurors in opening that they would hear a police officer's testimony that the victim repeatedly denied the occurrence of any sexual assault. *Id.* at 916-17. In making this representation to the jury, defense counsel relied on the officer's testimony from Greif's first trial. *Id.* at 917. Then the officer testified he never asked the victim whether she had been raped, explaining that he had confused another case with the case in which he was offering testimony. *Id.* at 917-18. The Greif court acknowledged the seriousness of defense counsel's inability to follow through on his representation during opening statement, noting that such lack of follow up is "quite serious" because of the damage it causes to defense counsel's credibility. *Id.* at 921. However, the court did not find undue prejudice in part because the trial court concluded "it would be 'obvious' to the jury that the reason [the officer] did not testify the way Greiff's counsel said he would is because [the officer] had made a mistake in his earlier testimony." *Id.* at 922. In addition, the court noted that the trial court "took appropriate curative steps to lessen any negative impact the opening statement may have had on Greiff's counsel's credibility," including admitting the officer's testimony from the previous trial

and instructing the jury to use it to assess the officer's credibility. *Id.* The Greif court also rejected an ineffective assistance of counsel claim because "Greif's claim was not based on the incompetence of his attorney" but on the fact that the State did not disclose the change in the officer's testimony in advance of defense counsel's opening statement. *Id.* at 925. "Because Grief d[id] not claim his counsel acted in a manner that was objectively substandard," the court determined Grief had not advanced a true ineffective assistance of counsel claim. *Id.* at 925-26.

However, Greif compels the conclusion that counsel's deficient performance prejudiced defendant Scott in this case. Defense counsel in opening statement promised to produce testimony regarding strong motive evidence for the fabrication of these charges against his client. RP 30. He explained that Wendy Scott, mother of the complaining witnesses, had learned on October 5, 2018, that he was involved with another woman and that he and the woman had a baby together. *Id.* Ms. Scott became so infuriated that she told defendant, "I wish you were dead" and "I'm going to get you." *Id.* She "got" him by having her teen-age daughters SNM and TRM fabricate sexual assault allegations against him. *Id.*

In opening statement, defense counsel presented their theory of the case, that is, that the sexual assault allegations were fabricated after Wendy Scott, mother of the alleged victims, learned on October 5, 2017, that defendant had a baby with another woman. RP 30. Defense counsel informed the jury that as soon as defendant returned home that day, Ms. Scott told him, "I wish you were dead. I'm going to get you." RP 30. Defendant had not been home on the morning on October 5, 2017, because he had spent the night with his baby's mother, Jennifer and the baby. RP 31. He also spent the night of October 6, 2017 with her. *Id.*

This opening statement theory, as noted, was never mentioned again during the State's case. Defense counsel never asked Wendy Scott about these statements. Defense counsel never asked her or her daughters if defendant came home that night and if an angry exchange occurred between Wendy Scott and defendant. Rather, it was as if, defense counsel, having given an opening statement, simply forgot about it. There is no sound tactical reason for this action.

In contrast to opening statement, in closing argument, defense counsel did not refer to any disharmony between defendant and Wendy Scott and her daughters at all. Rather, the closing argument portion delivered by attorney Frederick Hetter was a "stream of consciousness" monologue filled with misstatements of the law and testimony which drew frequent objections. After attorney Chapman stepped in to finish defendant's closing, the remainder of the closing went more smoothly but never referred back to the themes of the opening statement that Chapman himself had delivered.

By then, defense had lost all credibility with the jury.

Due to the ineffectiveness of trial counsel and the resulting prejudice, this court should reverse and grant defendant a new trial.

(b) *Trial counsel failed to interview the complaining victims and his interview of their mother was insufficient.*

Trial counsel had arranged to interview the two victims on the same day as their mother. On September 14, 2018, defense counsel Floyd Chapman interviewed the mother Wendy Scott in Olympia in the presence of the deputy prosecutor, a victim advocate, and a licensed private investigator. CP 108-113- Interview transcript. The interview was short.

DEFENSE COUNSEL: To this day, have they talked about that to you at all?

MS. SCOTT: No.

DEFENSE COUNSEL: They haven't?

MS. SCOTT: No, because I tell them not to talk to me about it.

CP 111-112, page 5. After asking her whether she was on any medications for anxiety or in counseling, defense terminated the interview. *Id.*

At the conclusion of that interview, the deputy prosecutor asked defense counsel if he wanted to interview SNM and TRM and he stated that he did not. *Id.* The deputy prosecutor emphasized that they were outside and that they were there for him to interview. 14.

There are no more important witnesses in a child sex crimes case than the child victims. In this case, SNM and TRM were both in their teens and so there was a presumption that they would be able to testify.

Indeed, they both testified at trial and their testimony disclosed issues that would have been discovered in pretrial interviews.

These issues would have been investigated for further use at trial as they were significant.

(i) Testimony of TRM.

As TRM was testifying, she disclosed that she was in special education because she is "really slow." RP 121. Her mother testified that TRM's diagnosis had been made by the Social Security Administration. RP 761. Defense counsel should have known these things prior to trial. The extent of TRM's cognitive disabilities likely would have been relevant at trial.

Had defense known that TRM had been diagnosed with cognitive disabilities, he should have made a motion for discovery of her school records. Any public school student with a cognitive disability has an individualized educational plan [IEP] which sets forth academic goals and is reviewed regularly. E.g., RCW 28A.155.045, 050. Such records likely would have been subject to in camera review by the trial court but would have provided important information about TRM's cognitive disability. *State v. Williams*, 194 Wn.App. 1027, 2016 Wn.App. 1420 (2016).⁶ TRM had an IEP. RP 761.

Further, had defense counsel conducted a competent interview of Ms. Scott, he would have learned that TRM's initial diagnosis was made by a physician employed by the Social Security Administration. RP 761. These records also should have been obtained for review prior to trial.

TRM's memory was very poor. She could not remember the name of the last school she attended. RP 121. She claimed that at the time of the trial in late May, 2019, near the end of the school year, she was being "home schooled." RP 121. However, she testified that after she and

⁶ This unpublished case is cited pursuant to GR 14.1(a), which provides: "Unpublished opinions of the Court of Appeals are those opinions not published in the Washington Appellate Reports. Unpublished opinions of the Court of Appeals have no precedential value and are not binding on any court. However, unpublished opinions of the Court of Appeals filed on or after March 1, 2013, may be cited as non-binding authorities, if identified as such by the citing party, and may be accorded such persuasive value as the court deems appropriate."

SNM told their mother that defendant had sexually assaulted them, they never returned to live in the Tumwater house. RP 148. She testified that "we were all over the place, we were basically homeless." *Id.*

TRM clarified that they moved back and forth from various relatives' house. *Id.*

Moreover, there was no individual identified who was present or had the ability to "home school" her. Her mother Scott worked as an associate mail carrier for the United States Post Office and worked long hours six days a week. RP 718-19, 721-22, 732. She was still employed in this capacity at the time TRM said she was being "homeschooled." RP 121.

Moreover, TRM had very little recollection regarding the frequency of the alleged sexual abuse. RP 150. She thought it would have been 15 times in a month, or maybe it would only have been 10 times or maybe 5. *Id.*

TRM testified that defendant got rid of her bed and that she had to sleep on the floor. RP 147. This unusual claim should have been investigated at trial because her sister SNM testified that TRM slept in a twin bed in the same bedroom and that she sometimes varied the which end of the bed at which she placed her pillow. RP 63-64. Neither SNM nor Scott ever testified that TRM did not have a bed at any time defendant resided with them. *Passim.*

TRM had no accurate recollection of how long defendant lived with their family. RP 122-23. She testified that it was "almost a year", "a year or so, maybe half a year." RP 123. She also agreed with the prosecutor's leading question that it could have been more than a year. RP 123. TRM testified that sexual encounters with defendant occurred in the kitchen with the fridge opened "and then he would bring me into his room, the room that he was sleeping with my mom in". RP 124.

TRM could not recall many details of what she said was the first incident. RP 130 She testified that defendant told her to come into her bedroom and take off her clothes, which she did. RP 129-30. She said that he told her not to tell anybody but could not remember if he ever said anything else. RP 130. She could not remember defendant was wearing any clothes. RP 130.

TRM remembered an incident in Tolmie Cove when she went into his bedroom and he had her lie down on the Dora the Explorer blanket. RP 132. She said it was dark. RP 132. TRM said that defendant sexually assaulted her in Tolmie Cove in the bedroom and in Tumwater in the kitchen or the bedroom. RP 133.

TRM testified that the last time defendant had sex with her was a month "after my sister and me came out with the truth." RP 138-39. The prosecutor used a leading question to correct her, "A month before?" RP 139. TRM testified that defendant would always come and get her and that sometimes her mom was home. RP 139.

(ii) TRM likely was not competent to testify and had trial counsel accomplished an effective pretrial investigation he would have been able to make a successful motion to exclude her testimony.

Children of all ages, including developmentally disabled children, are presumed competent to testify. RCW 5.60.050(2) prohibits testimony by "[t]hose who appear incapable of receiving just impressions of the facts, respecting which they are examined, or of relating them truly." When a child is developmentally disabled, competency is determined on a case-by-case basis, that apply to determining the competency of any child. *State v. SJW*, 170 Wn.2d 92, 239 P.3d 568 (2010). The party challenging competency has the burden of proof. *Id.* Competency in to testify in these circumstances in Washington is determined by application of the Allen factors. *State v. Allen*, 70 Wn.2d 690, 424 P.2d 1021 (1967). The Allen factors which the trial court should consider are:

- (1) The child's understanding of the obligation to speak the truth;
- (2) The child's mental capacity at the time of the events in question, to receive an accurate impression of the events;
- (3) Whether the child's memory is sufficient to retain an independent recollection of the events;
- (4) Whether the child has the capacity to express in words his or her memory of the events; and
- (5) Whether the child has the capacity to understand simple questions about the events. 70 Wn.2d at 692.

In the instant case, had trial counsel done their job, they would have established that TRM was not competent to testify.

Regarding factor (1), there was no discussion of her understanding of her obligation to speak the truth, She simply answered affirmatively when given the oath. Trial counsel should have explored her understanding of what it means to tell the truth in a court of law and what consequences might occur if people fail to do so. This is especially true in light of her tendency to eagerly agree with whatever leading question the deputy prosecuting attorney asked her. This behavior compelled the conclusion that TRM viewed her obligation as agreeing with the prosecutor more than relying on her own recollections, assuming that she had specific recollections.

Regarding factor (2), TRM's mental capacity, there was not much evidence on this. TRM testified that she was in special education and her mother testified that she an IEP and had been diagnosed as developmentally disabled by the Social Security Administration. RP 5/23/19 121, 761. Had trial counsel obtained Social Security administration diagnosis, IEP's. other school records and/or called her teachers, trial counsel would have had evidence of her mental capacity. These records likely would have supported a motion to disqualify her as an incompetent witness.

Regarding factor (3), TRM had a very poor memory when measured against objectively provable facts. For example, she could not recall where she went to school. RP 120. She did not know what classes she took. RP 120-21. She also did not know where she had lived with the defendant except "in a house." RP 122. The deputy prosecutor's leading question informed her that the house was in Tumwater on Primrose Land and it cannot be determined if TRM actually remembered that or if she simply trusted the deputy prosecutor not to mislead her. RP 122. TRM did recall that she had also lived in Tolmie Cove with him. RP 122. TRM could not recall how long defendant had lived with her. RP 122-23. She thought "almost about a year." RP 123. When the deputy prosecutor asked her, "A year or more than a year?", TRM replied, "A year or so, maybe half a year." RP 123.

Then when the deputy prosecutor asked, "So it is possible that it was more than a year?", TRM said, "Yeah." RP 123.

When the deputy prosecutor asked her about seeing pictures of the house they had lived in, TRM said it was "yesterday." RP 123-24. When the deputy prosecutor asked her if it could have been Tuesday, TRM replied, "Yes. Yes." RP 124. When asked about the last time she had engaged in sexual activities with defendant, TRM testified, "A month after, after, urn -after he got caught by what happened, after we left the house." RP 127. TRM also thought the last time happened "a month ago" [she made this statement on 5/23/19] RP 138; TRM also thought it was a month before she and her sister "came out with the truth" and she's "pretty sure she was still in school". RP 139. When the deputy prosecutor asked her if she was in school at that point or on summer break, TRM said, "I'm pretty sure I was still in school." RP 139. The prosecutor apparently wanted her to affirm that this happened in the new school year and so she asked the leading question, "Okay. The new school year had started?" and TRM replied, "Yeah. I'm pretty sure." RP 139. Clearly TRM had a poor sense of time, no concept of before or after because she thought the last episode of sexual assault had occurred "after" she and her sister reported defendant's alleged sexual abuse to her mother and they had moved away. She lacked specific memories of where they had lived and for how long. Her historical sense was inaccurate. Also, she had defendant having sex with her at night in the bed that he shared with her mother [his wife] and there was no testimony at all that Wendy Scott was ever absent from the house at night.

(4) Regarding this factor, whether TRM had the capacity to express in words his or her memory of events, TRM could not express certain facts such as dates, locations, and hard facts and she needed leading questions to provide answers. She was able to provide some information about alleged sexual activities with defendant.

It was clear that she had had meetings with the deputy prosecutor to go over her testimony, including the Wednesday before her testimony when they reviewed photos, statements, etc. (note, the deputy prosecutor and another individual from their office gave both girls trial preparation that included review of their prior statements and listening to the audio of their interviews two days prior to their testimony (RP 110-11).

(5) Regarding factor (5), whether TRM had the capacity to understand simple questions about the events, review of her examination establishes that it was hit and miss. When she did not understand, the deputy prosecutor resorted to leading questions or simply ignored TRM's nonresponsive answers. E.g., RP 127 [lines 5- 10]; RP 133 [prosecutor redirects TRM's testimony after she answers question regarding whether defendant ever instructed her on how to touch him by saying "Uh, no. I don't think so, no, but I could be wrong." The prosecutor asked a leading question incorporating something TRM previously may have said. RP 133]; when TRM stated that she was still in school when defendant had sex with her in her mother's bedroom, the deputy prosecutor asked her the leading question, "Okay, the new school year had started?" TRM answered, "Yeah. I'm pretty sure." RP 139. [again, this leading question was necessary to put the time within the charging period].

TRM had serious developmental disabilities and competent trial counsel would have known this had they conducted pretrial interviews. They would have obtained school records, including IEP's and other evaluations, and also Social Security Administration records. Trial counsel should have asked the trial court to convene a competency hearing at which the trial counsel would have carried the burden to prove incompetency. Trial counsel's failure to do so was ineffective assistance of counsel.

(iii) SNM's testimony was fraught with inconsistencies that trial counsel would have been able to develop in a pretrial and also should have emphasized at trial.

SNM testified that the first time defendant ever had sex with her was in the house on Primrose Lane sometime after spring break. RP 70. The family moved into that house at the end of March in 2017. RP 720, 722.

She said that spring break had just happened before the first time defendant approached her sexually. RP 71. She said she had "just returned to school as spring break⁷ had just ended". RP 71.

She thought they had been in the house at least a month. RP 71.

When the prosecutor asked her if it started "sometime after May 2017", SNM readily agreed. RP 71. Of course, the prosecutor asked this leading question in order to fit the time frame into the charging period for SNM's charges in the third amended information. CP 177-180.7 She said it almost always happened when people were asleep. RP 78.

She also testified that it happened in her mom's bed when her mom was at work. RP 78. She also maintained that it happened on the couch about a week before she told her mother. RP 82.

SNM testified that the defendant sent her many text messages. RP 85-86. She testified that "a few of them he was more set in the text messages, but over time he would send a dot or a dot, dot, dot ... "RP 86. SNM had defendant down as "dad" in her cellphone because she could not spell "Cortny." RP 87.

SNM testified that after "that incident" she would not go to bed until 5 a.m. and then would sleep until 3 p.m., RP 102. SNM describes herself as a "light sleeper" who "wakes up to sounds really easily." RP 108. She explained that she wakes up to the sound of a door opening or the sound of footsteps. RP 108. This was true when she shared a bedroom with TRM. RP 108. And yet she never heard TRM leave the bedroom during the night and/or heard defendant enter the bedroom to awaken TRM for sexual activities. Passim.

SNM disclosed that the prosecutor prepared her for her testimony a couple of days before her testimony. RP 99. SNM reviewed her statement to help herself remember. RP 111. She also listened to the audiotape from her statement. RP 111.

⁷ Trial counsel should have contacted the Olympia School District to determine the dates for spring break in the 2016-17 academic year. This simple task would have assisted in establishing the charging period.

Trial counsel should have conducted a pretrial interview of SM because trial counsel would have learned about the text messages that were withheld by the lead detective, the problems with the charging period and the obvious ways to address the State's difficulties with it, the household routine and the flaws in the alleged victims' statements in a case where two of the household members claimed to be very light sleepers [SNM and Wendy Scott and yet were oblivious to the alleged nighttime sexual assaults which were being committed in the small residence], as well as simply the numerous discrepancies in SNM's statements. There is no strategic or tactical plan that accounts for failing to interview either teen-age victim in a multi-count sexual assault. In fact, it is unheard of and is ineffective assistance because, as it did here, it only works to prejudice the defendant.

(c) Defense counsel was ineffective in closing argument, causing the court to reprimand counsel before the jury, excuse the jury from the courtroom, impose sanctions upon counsel, and cause a change of defense counsel during closing argument, all of which resulted in defense counsel's loss of credibility before the jury.

To establish ineffective assistance of counsel, the defendant must establish that his attorney's performance was deficient and the deficiency prejudiced the defendant. *Strickland v. Washington*, 466 U.S. 668,687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); *State v. Hendrickson*, 129 Wn.2d 61, 77-78,917 P.2d 563 (1996). Deficient performance is performance falling "below an objective standard of reasonableness based on consideration of all the circumstances." *State v. McFarland*, 127 Wn.2d 322,334-35,899P.2d 1251 (1995). Reasonable conduct for an attorney includes carrying out the duty to research the relevant law. *Strickland*, 466 U.S. at 690-91. The prejudice prong requires the defendant to prove that there is a reasonable probability that, but for counsel's deficient performance, the outcome of the proceedings would have been different. *State v. Leavitt*, 111 Wn.2d 66, 72, 758 P.2d 982 (1988). If either element of the test is not satisfied, the inquiry ends. *State v. Kylo*, 166 Wn.2d at 862.

The defense closing argument demonstrated a remarkable lack of competence. The purpose of closing argument is to argue to the jury why the State has not met its burden of proof and to provide reasons why the jury should acquit defendant. A well-planned closing argument weaves the themes of opening into the closing argument. In the instant case, the defense opening statement focused on Wendy Scott's fabrication of the charges as a means of retaliation against defendant after she learned that he was involved with another woman with whom he had a newborn son. RP 29-35.

By the time of closing, although defense had elicited no direct evidence of this, yet defense had solid evidence to argue this inferentially. E.g., RP 66-67, 127-29, 724, 733-34. However, defense did not refer to this even once in closing arguments. To the contrary, defense gave a confusing, disjointed argument that misstated the law, frustrated the trial court, resulting in numerous objections that were sustained, and caused a switch of counsel during defense closing.

Defense counsel began his argument by discussing the factors the jury would use to decide the case. RP 1090. His argument was contrary to Instruction No. 1, which read in pertinent part, "You must not let your emotions overcome your rational thought processes." RP 1050. Undeterred by the plain, clear language of this instruction, defense counsel argued:

Defense counsel: "You're gonna use your emotions, you're going to use your logic--"
DPA: "Objection, Your Honor."

Court: "I'm going to sustain the objection and tell the jury to disregard any reference to your emotions. You cannot use your emotions to decide this case."

Defense counsel: "Well, I was going to say despite the disregard -despite being instructed not to --"

Court: "Well, I did that for you. Don't do it. You may proceed." RP 1091.

Defense counsel continued with closing, enumerating a number of facts which should have been present had defendant committed the charged crimes. He informed the jury that if it found that any one of these factors existed, then the jury was required to enter a not guilty verdict. RP 1091-92. He argued:

Defense counsel: But after review of the evidence, or the lack thereof, you'll see that Mr. Scott is not guilty. There's virtually no possibility. If you find one of them probable or reasonably possible, then you're required by the constitution, the judge, the jury instructions, the government, to enter a not guilty, and also a promise you made at the beginning.

DPA: Your Honor, objection. Misstates the law.

Court: And ladies and gentlemen just remember that the law you are to follow is the what I gave to you. Sometimes lawyers may think things are consistent or inconsistent with that. I allow lawyers to make their argument, but when in doubt, look at the jury instructions, and that's what the law is. You may proceed. RP 1092.

This argument is contrary to instruction no. 4, the "reasonable doubt" instruction, which properly allocates the burden of proof to the State and provides that the State has the burden of proving each element of each crime beyond a reasonable doubt. The instruction also informs the jury that the defendant has no duty to prove that a reasonable doubt exists as to the elements. RP 1051. To the extent that trial counsel suggested that defendant could compel a not guilty if he proved any one of a number of factors, trial counsel was proposing something analogous to an affirmative defense, which does not exist for the crimes charged. At most, it seems that defense counsel wanted to misstate the law to confuse the jury.

Defense counsel also made arguments which strained his credibility by suggesting that counsel has asked Ms. Scott questions about the girls' laundry. He noted that both alleged victims claimed that they bled after the sexual assaults and also that their mother did the laundry. RP 1094-95.

Defense counsel: The reason we asked that question [about who did the laundry] is so we could prove to you that the mother never noticed any blood on the panties, on any pajamas. She never noticed anything to make an inquiry, which every single parent would do.

DPA: Objection, Your Honor. That's facts not in evidence. She was never asked. Court: Well, we're going to -I'm not going to rule on the objection again. I'm going to not give a standing objection because I think these objections are fair, but I would just remind you, facts are the facts. The lawyers' statements are here to help you. RP 1095.

Defense counsel continued the closing argument, using some references and inferences from the testimony of the State's crime laboratory witnesses as well as from information people might have heard from watching "forensics and those types of shows." RP 795-96, 891-93, 1097-98. This argument, of course, was contrary to that portion of the court's instruction no. 1, which stated, "The evidence you are to consider during your deliberations consists of the testimony that you have heard from witnesses and the exhibits that I had admitted during the trial. If evidence was not admitted or was stricken from the record, then you are not to consider it in reaching your verdict." RP 271.

Defense counsel continued to argue matters outside the trial record:

Defense Counsel: "... Whenever any touches a toilet handle, touches anything, they leave their cells. And the expert testified via transfer that it is equally consistent with there having been no sexual contact because the transfer of DNA occurs everywhere, especially where you live. You touch everything--"

DPA: "Your Honor, we have"

Court: I'm going to sustain that objection. That was not the expert's testimony. I'm going to ask you to leave right now ladies and gentlemen. Don't talk about the case. Don't look up anything about the case. I need to talk to the lawyers.

[JURY NOT PRESENT]

You're not the DNA expert. You didn't call your DNA expert. The matters you are calling attention to right now is you trying to introduce pieces of information that haven't been talked about during trial. [The dpa] didn't object to the million cells a day that have been shed by a person probably because she feels like she is objecting so much that it's going to call attention to her. But that wasn't testified to by anyone. That question was asked, and that has continued.

Defense counsel: He testified to that. No, the DNA loss.

Court: Regardless, there are a lot of liberties being taken in this closing argument that are not acceptable. I will continue to -I start sustaining these objections .. I have not seen this many objections in a closing argument nor have I seen such an objectionable closing argument. And so, you're going to have to rein this in and if that means deviating from your apparent script, you're going to need to do that. RP 1098-99.

Defense counsel continued to argue with the court. RP 1099-11. The court responded, "And I will say there is zero chance that that testimony ever came out of anyone's mouth, and it's inconceivable, given the line of testimony, that that could be a reasonable inference." RP 1100. Defense assured the court that he would "rein it in." RP 1100.

The court replied, "We're going to hopefully see no more of those [liberties taken with the evidence]." *Id.*

Although the jury was absent for much of the above exchange, the jury obviously could have picked up from the trial court's comments that the trial court had an unfavorable opinion of defense counsel and needed to discuss this matter with him. The string of objections that were sustained had included comments impliedly critical of defense counsel, e.g., "remember that the law you are to follow is what I gave to you. Sometimes lawyers may think things are consistent or inconsistent with that." RP 1092.

As closing argument continued, defense counsel recounted the testimony of TRM. He correctly recounted her testimony when responding to the deputy prosecutor's question about a description of what defendant had done to her, she blurted out, "No, that's what my father did." RP 1118 (citing to TRM's testimony at 130).

The deputy prosecutor interposed an objection which the court sustained. RP 1118. The court instructed the jury to leave "right now." RP 1118. The court then asked defense counsel:

Show cause payable right now why I should not sanction you \$2000 payable to the Thurston County Legal Services for intentionally violating the Court's order about this hard-fought issue where we're not referencing this. Mr. Hetter, why should I not sanction you? RP1118.

Defense counsel offered brief comments to the court and the court remained dissatisfied with him. RP 1119. The court informed the parties that the sanctions would remain and that because the court was "very angry", the court would take a recess "to make sure that I can calm myself down and properly judge the remainder of this case." RP1119.

When the jury returned the court gave an instruction:

First, the jury will disregard prior comments with regard to testimony by a witness with regard to someone's father and what may or may not have occurred. Additionally, I will just remind you that statements by lawyers, both legal argument and facts, need to be supported by the evidence and my instructions. These closing arguments are merely intended to help you understand the facts and apply the law. RP 1120.

However, the trial court's admonition to the jury and imposition of sanctions upon defense counsel was improper. This is so because TRM's testimony remained in the trial record after she blurted out this response to the deputy prosecutor's question.

There was no objection to the answer. There was no motion to strike it. The trial court did not instruct the jury to disregard it. It is axiomatic that the jury may consider all testimony that remains in the record when the case ends. *Wiehl, Instructing a Jury in Washington*, 36 *Wash. L. Rev.* 378,401(1961) (discussing cases where courts had rejected jury instructions directing juror's attention to specific items of evidence, noting "the jury will consider all evidence not stricken by the court and it is the attorneys' function to (and they undoubtedly will) call attention to such evidence in their argument."). Defense counsel in this instance properly commented on TRM's blurted out comment which showed her confusion about what had happened to her and who had actually touched her. It was relevant because it allowed the jury to see her cognitive limitations and inability to discriminate between what her biological father had done to her and what she now claimed defendant had done. This is important because apparently she claimed the two men had done the same thing. Yet in the defendant's case, despite the presence of very light sleepers, no one ever heard defendant enter the shared bedroom of SNM and TRM on multiple occasions in Tumwater when defendant allegedly awakened TRM and told her to accompany him to another location in the house for sexual activity. case, despite the presence in the house of two very light sleepers, no one ever

At this point, in defense closing argument, attorney Chapman took over. RP 1120. The remainder of his closing argument was uneventful. However, attorney Chapman never returned to the theme of his opening.

Defendant's private attorneys performed ineffectively throughout the preparation for and conduct of this trial. They had no theory of the case that they pursued through the case. Their opening statement presented a theme that was abandoned when counsel sat down after giving the opening. The cross-examination of the State's witnesses failed to develop inconsistencies as well as the theme of the opening statement.

Even without the phone to examine, defense counsel could have called an expert to testify about what examination of a cell phone could determine.

Trial counsel's closing argument showed a lack of knowledge of criminal law as counsel misstated the reasonable doubt concept, the benchmark standard in criminal trials, and asked the jury to decide the jury considering "evidence" from television shows on criminal investigations. This court should reverse his convictions and remand for a new trial.

3. THE TRIAL COURT ERRED IN INSTRUCTING THE JURY TO DISREGARD TRM'S SPONTANEOUS COMMENT TO THE DEPUTY PROSECUTOR'S QUESTION THAT HER BIOLOGICAL FATHER HAD SEXUALLY TOUCHED HER WHEN THERE WAS NO OBJECTION TO THAT COMMENT. NO MOTION TO STRIKE, AND THE COMMENT REMAINED IN THE RECORD FOR THE JURY TO CONSIDER.

A party opens the door to evidence when the evidence comes in through a party's witness and there is no motion to strike, no objection, and the evidence remains in the record. e.g, *State v. Oneal*, 126 Wn.App. 395, 109 P.3d 429 (2005), *aff'd*, 159 Wn.2d 500, 150 P.3d 1121 (2007).

The door is opened only by the introduction of evidence. It is not opened, for example, by counsel's opening statements to the jury. *State v. Whelchel*, 115 Wn.2d 708, 801 P.2d 948 (1990).

An illustrative case is *State v. Warren*, 134 Wn. App. 44, 138 P.3d 1081 (2006), *aff'd* 165 Wn.2d 17, 195 P.3d 940 (2008). In that case, a prosecution for molestation and rape of a child, the defendant testified that he had been a good caretaker of his own daughter. He also testified that although he might have put medicine on his daughter's arms or back, there were certain areas he definitely would not touch "because she is a girl". The trial court allowed the State to cross-examine the defendant about his conviction for molesting another girl as well as sexually explicit rap lyrics he had written. The court held that the cross-examination was relevant to his credibility. To be relevant, the rebuttal must relate to the principal issues at trial.

In the instant case, the State prevailed on a pretrial motion to exclude evidence that TRM and SNM were sexually assaulted by their biological father. RP 191.

However, after TRM blurted out that she had just described what her dad used to do, the deputy prosecutor did not move to strike it. RP 130. Rather, the evidence remained in the record for consideration by the jury. Because it remained in the record, defense counsel properly referred to it in closing argument.

4. THE TRIAL COURT'S COMMENT TO THE JURY TO DISREGARD EVIDENCE THAT WAS PROPERLY IN THE RECORD FOR THE JURY TO CONSIDER WAS AN UNCONSTITUTIONAL COMMENT ON THE EVIDENCE THAT WAS PREJUDICIAL TO DEFENDANT AND REQUIRES REVERSAL.

Article IV, section 16 of the Wash. Const. states that "[j]udges shall not charge juries with respect to matters of fact, nor comment thereon, but shall declare the law." Washington courts apply a two-step analysis when deciding whether reversal is required as a result of an impermissible judicial comment on the evidence in violation of article IV, section 16. Judicial comments are presumed to be prejudicial, and the burden is on the State to show that the defendant was not prejudiced, unless the record affirmatively shows that no prejudice could have resulted. *State v. Lane*, 125 Wn.2d 825, 838-39, 889 P.2d 929 (1995); *State v. Stephens*, 7 Wn. App. 569, 573, 500 P.2d 1262 (1972), *aff'd in part, rev'd in part*, 83 Wn.2d 485, 519 P.2d 249 (1974) (the State has the burden of showing that the jury's decision was not influenced, even when the evidence is undisputed or overwhelming); *State v. Bogner*, 62 Wn.2d 247, 251, 254, 382 P.2d 254 (1963) (burden is not on the defendant to show prejudice; reversible error unless the record affirmatively shows that the defendant could not have been prejudiced by the error; citing cases, including *State v. Amundsen*, 37 Wn.2d 356, 223 P.2d 1067 (1950), where the court held that the burden was on the State to show no prejudice actually resulted); *In re Det. of R. W.*, 98 Wn. App. 140, 144, 988 P.2d 1034 (1999); see *State v. Manderville*, 37 Wash. 365, 371, 79 P. 977 (1905).

The presumption of prejudice test has consistently been applied to oral comments made by a judge during the course of a trial. *State v. Bogner*, 62 Wn.2d at 252.

In the instant case, the trial court erroneously instructed the jury to disregard evidence that was properly before them. [see previous section]. RP 1120.

This was important evidence because it assisted the jury in evaluating whether TRM's memory was flawed and that how likely it was that she mistook what happened with her biological father in her allegations against defendant, which allegations did not arise until she knew her mother was mad at him. TRM was by all the evidence a developmentally disabled individual with, as she put it, slowness and poor memory. TRM was developmentally disabled and could not remember many things, such as where she went to school, how long defendant lived with them, when the last time he had touched was [she thought it was a month after he moved out]. Defense counsel obviously wanted to argue that TRM's memory was poor and that she had sexual assault memories that she had confused. This was essential to the factfinder's determination of other credibility.

In addition to commenting on the evidence in its statement, "First, the jury will disregard prior comments with regards to testimony by a witness about references to someone's father and what may or may not have occurred", the court went on to make unflattering comments about defense counsel. The court continued, "I will just remind you that statements by lawyers, both legal arguments and facts, need to be supported by the evidence and my instructions." RP 1120. The court's admonition was wholly improper.

The evidence of TRM's statement about her biological father was in the record without any objection, motion to strike, or limitation. The time to remove the evidence from the record was long past. The evidence rules have no provision for the trial court to strike sua sponte evidence from the record during closing argument. Further, the trial court's comment about the lawyers strongly suggested that defense counsel had just made an argument that was not supported by the record. Of course, that was not true. Or it was true only if one accepted the notion that the trial court's nunc pro tunc removal of the evidence affected defense counsel's argument, too.

In this case, the trial court's capricious and unconstitutional comment on the evidence denied defendant his right to a fair trial and requires reversal.

5. THE STATE FAILED TO PROVE THE CHARGES BEYOND A REASONABLE DOUBT.

Under both the federal and state constitutions, due process requires that the State prove every element of every crime charged beyond a reasonable doubt. *U.S. CONST. amend. XIV*; *WASH. CONST.* art. I, § 3; *In re Winship*, 397 U.S. 358, 364, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970); *State v. Cardenas-Flores*, 189 Wn.2d 243, 265-266, 401 P.3d 19, 31 (2017); *State v. Rich*, 184 Wn.2d 897, 903, 365 P.3d 746 (2016); *State v. Johnson*, 188 Wn.2d 742, 750, 399 P.3d 507, 511 (2017). Evidence is sufficient to support a guilty verdict if any rational trier of fact, viewing the evidence in the light most favorable to the State, could find the elements of the charged crime beyond a reasonable doubt. 115 *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992); *State v. Camarillo*, 115 Wn.2d 60, 71, 794 P.2d 850 (1990). When a defendant challenges the sufficiency of the evidence, he or she admits the truth of all of the State's evidence. *State v. Drum*, 168 Wn.2d 23, 35, 225 P.3d 237 (2010). In such cases, appellate courts view the evidence in the light most favorable to the State, drawing reasonable inferences in the State's favor. *Salinas*, 119 Wn.2d at 201. Circumstantial and direct evidence are to be considered equally reliable. *State v. Thomas*, 150 Wn.2d 821, 874, 83 P.3d 970 (2004). "Credibility determinations are for the trier of fact" and are not subject to review. *State v. Camarillo*, *Id.* If, after reviewing the evidence, the appellate court determines the evidence was insufficient as a matter of law, the double jeopardy clause entitles a defendant to a dismissal with prejudice. *Burks v. United States*, 437 U.S. 1, 57 L.Ed. 1, 98 S. Ct. 2141 (1978).

In the instant case, the jury convicted defendant of three counts of rape of a child in the second degree for victim SNM. Count I is alleged to have occurred on October 5, 2017 and happened on the couch on the living room. RP 68-69. Count II was alleged to have occurred between June 1, 2017 and October 5, 2017. SNM testified that the first time occurred at the Tumwater house "when [she] went to school, spring break had just ended." RP 71. SNM thought they had moved into the house in April 2017. RP 71. Wendy Scott testified that they moved into the house at the end of March. RP 722.

In response to another leading question from the prosecutor, SNM agreed that the sexual assault had occurred "sometime after May 2017." RP 71. The deputy prosecutor needed SNM to answer the question in the affirmative in order to meet the dates in the charging document. CP 177-180. The deputy prosecutor successfully persuaded SNM that doubt was to her advantage and so her testimony transmogrified, "I think it had been at least a month in the house before he started anything." RP 71.

The other incident that SNM described in detail was an incident that occurred in her mom's bed. RP 80. The deputy prosecutor focused SNM's attention on the timing of the incident in her mom's bed which was in the summer of 2017 with which SNM concurred. RP 81. The timing was in contrast to the incident on the couch which SNM agreed with the prosecutor occurred in the summer of 2017. RP 82. However, Wendy Scott was home with a broken leg from January 2017 until the end of June 2017. RP 721. She broke her leg again on September 12, 2017 and was home thereafter until she broke up with defendant in early October. RP 723.

Because SNM testified that the first time anything happened in the Tumwater house was right after spring break ended when she had returned to school, SNM 's testimony placed the charging date before May 1, 2017. RP 71. However, the deputy prosecutor needed to massage the dates and move the date into June 2017 in order to comport with the third amended information and so she pressured SNM to move the date into June through her questions, ultimately getting her to answer that the first time was "sometime after May 2017." RP 71. This examination regarding the timing was not a search for the truth, as SNM and Wendy Scott were both certain that they had moved into the house in late March or early April. RP 71, 722. The prosecutor needed SNM to recant her testimony that defendant first sexually assaulted her just after spring break ended.

When TRM testified, she displayed a lack of memory on many points. She did not remember where she had gone to school. RP 120. She did not know what classes she had taken in school. RP 120-121. She stated that she was "special needs" but she was not in school because she was "home schooled." RP 121.

She testified that she was "really slow" basically reading, spelling, and math. RP 121. She could remember where the house was that she lived in most recently with her mother and sister. RP 122.

spelling, and math. RP 121. Only the prosecutor's leading question caused her to answer "yes" to the suggestion that the house had been in Tumwater on Primrose Lane. RP 122, 126. Prior to that house, they had lived in Tolmie Cove, which TRM did remember. RP 122.

The prosecutor asked her if the defendant ever asked her to touch him and TRM said that he did in both houses. RP 132-33. The prosecutor tried to focus her attention on the Tolmie Cove house and asked her whether defendant had instructed her how to do it. RP 133. TRM answered, "No, I don't think so. I could be wrong." RP 133. The prosecutor asked another leading question, "Okay. Did he ever tell you that you had to get a really good grip on him?" RP 133. TRM answered, "Yes." RP 133. The prosecutor asked her what she had to do when touching his penis at Tolmie Cove. RP 133. TRM replied that she had not had to touch his penis there. RP 133.

TRM's memory of events in Tolmie Cove was poor. She could not remember if they had lived in a two bedroom or three bedroom house. RP 140.

She could not recall any specific instances of sexual intercourse with defendant at Tolmie Cove but in response to the prosecutor's question, "And it did happen in your mother's bedroom at both houses?", TRM answered, "Yeah, I'm pretty sure, yeah." TP 140.

TRM's answers to the deputy prosecutor's leading questions established that she a childlike level trust that the deputy prosecutor would only encourage her to say things were "right." Truthfulness was not established; what was established was the desire to please.

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6. THIS COURT SHOULD REMAND THIS MATTER TO THE SUPERIOR COURT FOR CORRECTION OF THE JUDGMENT AND SENTENCE.

Defendant was convicted of four counts of second degree child rape, class A felonies, and one count of second degree child molestation, a class B felony, RCW 9A.44.083. The judgment and sentence incorrectly notes that second degree child molestation is a class A felony with a maximum term of life. CP 394. This is incorrect.

In addition, as part of the Judgment and Sentence, the trial judge sent a letter attach to the Warrant of Commitment -Attachment to Judgment and Sentence (Prison) informing "The Sheriff of Thurston County and the proper officer of the Department of Corrections" that Cortny Ray Scott has been convicted in the Superior Court of the State of Washington for the crimes of, inter alia, Child Molestation in the First Degree. (1 Count)." CP 403. Child molestation in the first degree is a Class A felony. RCW 9A.44.083. This letter, signed by the trial judge, obviously conveys incorrect information and needs to be corrected as well.

7. DEFENDANT IS ENTITLED TO RELIEF UNDER THE CUMULATIVE ERROR DOCTRINE.

"The cumulative error doctrine applies when several errors occurred at the trial court level to deny the defendant a fair trial, even though no single error alone warrants reversal." State v. Lewis, 156 Wn. App. 230, 245, 233 P.3d 891 (2010). In the instant case, defendant is entitled to relief because trial counsel made objectively unreasonable decisions or unfairly prejudiced him. In this case, trial court performed ineffectively throughout the case. Trial counsel conducted an inadequate pretrial investigation by failing to interview the teen-age victims who alleged multiple sexual assaults by defendant, failing to get education records of TRM which would have documented her mental incapacities and likely supported a challenge to her competency as witness, failed to develop and present a cohesive defense at trial, failed to argue that TRM's blurted out statement regarding the sexual abuse by her biological father was admissible where the answer, although nonresponsive, remained in the record without objection and without being stricken and therefore was proper for the jury to consider.

In addition, the police investigation deprived defendant of his constitutional rights as the detective, although admitting that he always collected all relevant evidence, failed to collect the cell phone on which defendant allegedly summoned SNM to sexual acts in the nighttime, thereby depriving defendant of any opportunity to contest SNM'S allegations on this significant point.

Perhaps most significantly, the trial court's conduct deprived defendant of a fair trial. The trial court's comment on the evidence during closing argument denied the jury the opportunity to consider important evidence in evaluating the credibility of TRM, the weaker of the two complaining witnesses, and also strongly suggested to the jury that the trial court held defense counsel in low esteem. These actions also deprived defendant of a fair trial and due process.

E. CONCLUSION

For the foregoing reasons, defense respectfully asks this court to grant the requested relief.

DATED this 8th day of May, 2020

/s/ BARBARA COREY
Barbara Corey, WSB #11778
Attorney for Cortny Ray Scott

I declare under penalty of perjury under the laws of the State of Washington that the following is a true and correct: That on this date, I delivered via the filing portal a copy of this Document to: Appellate Division Thurston County Prosecutor's Office and to Cortny Scott via USPS
William Dummitt Date Legal Assistant

5/8/20

/s/ William Dummitt
Legal Assistant

BARBARA COREY, ATTORNEY AT LAW

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