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No. 54170-0-II

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

STATE OF WASHINGTON,

Respondent,

v.

JASON DONALD STREIFF,

Appellant.

OPENING BRIEF OF APPELLANT

On Appeal From Lewis County Superior Court
The Hon. James Lawler, Presiding

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A. ASSIGNMENTS OF ERROR

1. Appellant Jason Streiff assigns error to the entry of the verdicts and the entry of the judgment and sentence. CP 67, 68, 69, 85-96.

2. The trial court erred when it denied Mr. Streiff's motion to dismiss Count III based on improper venue.

3. Mr. Streiff was denied his right to a jury of the county in which Count III allegedly was committed.

4. There was insufficient evidence to support the conviction in Count I.

5. The trial court erred by not suppressing Mr. Streiff's statements to a police officer. Mr. Streiff therefore assigns error to "Undisputed Facts" 1.3, 1.4, 1.5 and 1.8; Conclusions as to Disputed Facts 3.1 and 3.2; and Conclusions on Admissibility 4.1 and 4.2. CP 82-84 (attached in App. A).

6. Prosecutorial misconduct during closing argument denied Mr. Streiff a fair jury trial and due process of law.

7. Persistent opinion and conclusion testimony and improper questions by the prosecutor assuming guilt denied Mr. Streiff due process of law and the right to a fair jury trial.

8. Mr. Streiff assigns error to Instructions 5, 6 and 7 for using pseudonyms for the complaining witnesses and for including their birth dates. CP 57, 58 and 59 (attached in App. B).

9. Conviction and sentences for both Counts I and III violated double jeopardy.

10. The trial court erred when imposing 36 months of community custody on each count.

11. The trial court erred by determining that Mr. Streiff was subject to indeterminate sentencing. CP 85.

12. Mr. Streiff was denied the right to effective assistance of counsel.

13. Cumulative error denied Mr. Streiff a fair jury trial and due process of law.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Where Count III allegedly occurred in Cowlitz County, was it proper to try it in Lewis County with jurors who all resided in Lewis County?

2. Can a conviction for child molestation be based kissing on the lips?

3. When the police officer interrogated Mr. Streiff after Streiff asked him to stop asking questions and when the officer engaged in unwanted physical touching of Mr. Streiff's body, was the interrogation custodial and were his statements involuntary?

4. Did the prosecutor commit reversible misconduct in closing argument by asking the jurors to hold Mr. Streiff "accountable" and by using an inappropriate "scales of justice" analogy?

5. Is reversal required by the persistent conclusions and opinions as to guilt contained in the prosecutor's questions and witnesses' answers?

6. Instructions Nos. 5, 6 and 7 used pseudonyms and set out birth dates for the complainants. Did these instructions constitute an improper sealing and closure, constitute a comment on the evidence and lessen the burden of proof?

7. Should the sentence be reversed because of violations of double jeopardy, a term of community custody that exceeds the legal maximum, and an incorrect designation of this case as being subject to indeterminate sentencing?

8. Was Mr. Streiff denied effective assistance of counsel?

9. Does cumulative error require a new trial?

C. STATEMENT OF THE CASE¹

1. *Procedural History*

By a Third Amended Information filed in Lewis County Superior Court, the State charged Mr. Streiff with three counts of child molestation in the third degree. Counts I and III alleged that Mr. Streiff had sexual contact with C.M.J. (DOB: 6/16/04) in Lewis County on or about August 11, 2018, through August 12, 2018, for Count I, and on or about August 12, 2018, in the State of Washington for Count III.² Count II alleged sexual contact with K.L.W. (DOB 12/20/02) on or about August 12, 2018, in Lewis County. CP 47-49.

The case was tried to a jury in July 2019, the Hon. James Lawler presiding. The defense moved to dismiss Count III based on insufficient venue, but that motion was denied. RP 5-8. After a CrR 3.5 hearing, the court ruled that Mr. Streiff's statements to a police officer were admissible

¹ Additional facts related to each assignment of error will be set out in the sections addressing each issue.

² Mr. Streiff recognizes that this Court has a General Order that requires the use of initials for witnesses under the age of 18. General Order 2011-1. Despite the argument below that such an order actually constitutes an unconstitutional sealing, counsel will follow that order, but such action should not be seen as a concession that the order is constitutional.

in the State's case-in-chief. CP 83-84; RP 138-39. The defense moved to dismiss Count I based on insufficient evidence after the close of the State's case, but the court denied this motion. RP 369-73.

The jury returned verdicts of guilty on all three counts. CP 135-142. The defense renewed its motion to dismiss based on insufficient evidence and again the motion was denied. RP 451-52. On September 19, 2019, the court imposed a standard range sentence of 54 months on each count, followed by 36 months of community custody for each count. CP 85-96. This appeal timely followed. CP 101.

2. General Substantive Facts

Jason Streiff was born in 1986 and lived his whole life in Cowlitz County. He graduated from Castle Rock High School in 2005. Since 2008, he has worked steadily as a laborer doing scaffolding work. He has no criminal history. CP 71-73.

Mr. Streiff went to school with two brothers, Brandon and Mathew ("Mat") Jackson,³ and remained friends with them. RP 226-27, 325. In August 2018, Brandon lived in Castle Rock (in Cowlitz County) with his spouse, Christina Jackson, and their three children, C.M.J. and her two little

³ To avoid confusion, first names will be used. No disrespect is intended.

brothers. RP 226, 230. There was testimony that C.M.J. was 14 years old at that time. RP 162. Mat lived in Winlock (in Lewis County) with his own daughter, his partner, Clara Winter, and her daughter, K.L.W. RP 324. There was testimony that K.L.W. was 15 years old in August 2018. RP 265.

On August 11, 2018, there was a large birthday party for Mat at his home in Winlock. There was food, alcohol, and swimming. By 4 a.m. the next morning, most people had left, but rather than drive back to Cowlitz County under the influence, Brandon, his family and Mr. Streiff spent the night at Mat's house. By all accounts, Mr. Streiff had had a lot to drink and went to sleep in a downstairs bedroom. RP 163-66, 177-83, 202-09, 216-18, 227-28, 238-39, 267-69, 287-89, 311-13, 320-22, 325-26, 329-31.

C.M.J. testified that she went to sleep on the floor of the same bedroom that Mr. Streiff was asleep in, and that she woke up to find Mr. Streiff on top of her, trying to kiss her. She said she got up and went into another room, and went to sleep on a couch with two younger children. She said she again woke up and Mr. Streiff was again on top of her trying to kiss her. When her little brother made a noise, Streiff left. RP 166-69.

K.L.W. testified that she was asleep in her own room in the basement. She claimed that after 6:00 a.m. Mr. Streiff came into her room, kissed her

on the neck, put his hand under her shirt and touched her breast and also touched her vaginal area over her clothing. At one point, she told him to stop and he said “no, you like it.” She pushed him away and got up; she walked out of the room and he followed her out and walked into the other bedroom. RP 277-78.

C.M.J. testified that when she woke up that same morning, she went upstairs and there was a normal morning until her family drove home to Castle Rock. She did not say anything to anyone about what supposedly happened. When she and her father arrived back home, Mr. Streiff came over to the house. Streiff sat in the living room on a couch with her while Brandon played video games close by. C.M.J. claimed that, with her father present, Mr. Streiff touched her breasts and vaginal area, although Brandon said he did not see anything as he was playing video games. RP 169-71, 190-93, 230-33, 239-43.

In contrast to C.M.J., K.L.W. testified that after Mr. Streiff left her room, she called her boyfriend and told him what happened. She went to his father’s company picnic. RP 279-81, 303-09. Later when she came home she told her parents. However, they decided that because Mr. Streiff was “really impaired and intoxicated” they would not report the incident to the police.

RP 315. Mat did call Mr. Streiff and asked him if he knew what he did the night before. Streiff said he did not know. When Mat told him, he started crying and said that if Mat was going to call police, he would turn himself in. Mat told Streiff not to come to their house again. RP 327-28.

On October 19, 2018, Mr. Streiff was again at the home of Brandon and his family in Castle Rock. Streiff and Brandon played the guitar, and C.M.J. sang along with them. Her mother and a friend, Sadie Parsons, were in the back. At some point, Streiff and Brandon went to go drink at a bar. C.M.J. told Ms. Parsons that Streiff made her feel uncomfortable, and she then told her what she claimed had taken place a few months earlier. Parsons told C.M.J. she needed to talk to her mother, Christina. Once C.M.J. did so, Christina called Brandon back from the bar and C.M.J. told him what happened. RP 173-75, 209-11, 234-36, 243-45, 254-63.

Brandon called his brother, Mat, to tell him what had taken place at party in August, and Mat was confused because he thought that Brandon was talking about K.L.W.'s allegations. Ultimately, the two families contacted the police. RP 236-238, 300-01, 316.

Lewis County Sheriff's Deputy Andrew Scrivner arranged to interrogate Mr. Streiff at his home. Streiff denied molesting the girls,

although he admitted he had a lot of alcohol that night and did not remember doing anything wrong. RP 339-65.

D. ARGUMENT

1. *Trial of Count III in Lewis County Violated the Right to Have a Case Tried in the County Where the Crime Allegedly Occurred with Jurors from that County*

a. Additional Facts

On December 7, 2018, the State initially charged Mr. Streiff with two counts of third degree child molestation, both allegedly occurring in Lewis County, with one count related to C.M.J. and the other related to K.LW. CP 1-2. The statement of probable cause filed along with this Information summarized only charges in Winlock and did not mention the charges in Castle Rock. CP 4-5.

On April 19, 2019, the State filed an Amended Information adding a third count, involving C.M.J., but continuing to allege that the acts occurred in Lewis County. CP 11-12. On July 18, 2019, at 4:43 p.m., the State filed a Second Amended Information changing the venue in Count III to the “State of Washington” and eliminating an alternative means for each count. CP 18-19. A review of the transcript for the proceedings of that date does not show that the subject of the Second Amended Information was ever brought up,

with discussion revolving solely around defense counsel's request for a continuance. RP (7/18/19) 2-9.

When the case was sent out for trial on July 23, 2019, prior to jury selection, the court asked if Mr. Streiff had been arraigned on the Second Amended Information. When the State said he had not, the defense objected to Count III on the basis of venue, noting that Count III allegedly occurred in Castle Rock in Cowlitz County. Counsel noted that this was his first opportunity to object and asked that the count be severed from trial or dismissed. RP 4-5. The State argued that the Amended Information related to Castle Rock, that the police report made it clear that the allegations related to Castle Rock and that "it was a mistake to leave Lewis County because it's not part of Lewis County." RP 6.

Defense counsel cited "Court Rule 5.1 and relevant case law regarding venue." RP 6. The State argued that joinder was appropriate, and that the Court had the authority to try the case in Lewis County because "this count happened just a few hours after the two counts happened in Lewis County" and that because the witnesses were the same. Therefore, "in the interest of justice, in the interest of judicial economy" the court had authority to try all three counts together. RP 7. The court denied the venue motion,

ruling “Lewis County has jurisdiction, can deal with these cases. They are closely related.” RP 8. Mr. Streiff was then arraigned on the amended information. RP 8.⁴ Paralleling the amended information, Instruction No. 7, the “to convict” instruction for Count III, required the jurors to find that the State had proven the charged act “occurred in the State of Washington.” CP 59.

All jurors in the case were from Lewis County. According to the “jury questionnaire” given to all potential jurors, all jurors had to certify they were residents of Lewis County or else they would be disqualified. App. C.⁵

b. Count III Should be Reversed Because of the Violation of the Vicinage Requirement

The right to have a jury selected from the locale where the crime allegedly took place – the “vicinage” requirement – is constitutionally protected in Washington. Article I, section 22 (amendment 10) of the Washington Constitution provides in part:

In criminal prosecutions the accused shall have the right . . . to have a speedy public trial *by an impartial jury of the county in which the offense is charged to have been committed.* . . .

⁴ A Third Amended Information was filed the next day, July 24, 2019, correcting a birth date, but keeping venue as the “State of Washington” for Count III. CP 47-49

⁵ Parallel with the filing of this brief, Mr. Streiff will file a motion to supplement the record with this document which apparently was not filed below.

Emphasis added.

Similarly, the Sixth Amendment provides in part:

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 . . .*

Emphasis added.⁶

The right to have “jury of the county” has its origins in the gradual abandonment of the traditional common law method of selecting a jury. Originally, a petit jury was selected from the vicinage or neighborhood or hundred in which the offense occurred, with the jurors expected to reach a verdict based upon their personal knowledge of the facts of the case. *See Hernandez v. Municipal Court*, 263 Cal. Rptr. 513, 49 Cal.3d 713, 781 P.2d 547, 550-51 (1989), *overruled in part by Price v. Superior Court*, 25 Cal. 4th 1046, 108 Cal. Rptr. 2d 409, 25 P.3d 618 (2001); *State v. Newcomb*, 58 Wash. 414, 418, 109 Pac. 355 (1910). Gradually, “English juries evolved into bodies to hear the evidence, and previous knowledge became a principal

⁶ The U.S. Supreme Court has not yet decided that the Sixth Amendment’s vicinage requirement applies to the states through the Fourteenth Amendment’s Due Process Clause, and courts have reached inconsistent conclusions. *See generally Stevenson v. Lewis*, 384 F.3d 1069, 1071-72 (9th Cir. 2004) (explaining cases). Mr. Streiff asks that this Court adopt the position that the vicinage requirement applies to the states through the Fourteenth Amendment’s Due Process or Privileges and Immunities Clauses.

cause for rejecting jurors[.] [J]urors nevertheless continued to be drawn from the vicinity of the crime,” *Hernandez v. Municipal Court*, 781 P.2d at 551, and the right to a “jury of the county . . . has, from the earliest times, been regarded as one of the greatest securities of life, liberty, and property of the citizen.” *Zanone v. State*, 97 Tenn. 101, 36 S.W. 711, 712 (1896) (internal quotations and citations omitted).

The Washington Supreme Court recently relied on article I, section 22's vicinage requirement to reverse a conviction for a gross misdemeanor where some jurors from King County sat on a jury that convicted the defendant of stalking that allegedly took place in Snohomish County. The crime allegedly occurred in the City of Bothell, which straddled two counties and jurors were selected from the entire city, rather just from the portion of the city in Snohomish County. *City of Bothell v. Barnhart*, 172 Wn.2d 223, 257 P.3d 648 (2011). The Supreme Court recognized that in prior cases, the Court had allowed for jurors to be selected from portions of a county. *Id.* at 230-31.⁷ “Although recognizing that jurors may be drawn from subdivisions within the county where the crime was committed, we have never held that

⁷ Citing *State v. Lanciloti*, 165 Wn.2d 661, 671, 201 P.3d 323 (2009); *City of Tukwila v. Garrett*, 165 Wn.2d 152, 164-65, 196 P.3d 681 (2008); *State v. Twyman*, 143 Wn.2d 115, 125, 17 P.3d 1184 (2001); *State v. Newcomb*, 58 Wash. at 418.

a juror could be selected from outside the county.” *Barnhart*, 172 Wn.2d at 230.⁸

The requirement that jurors trying someone for a crime come from the county where the crime allegedly was committed ties in with the limited authority of county prosecutors in our state. “Prosecutors in Washington State are elected and subject to recall by the citizens of the county they serve.” *State v. Bryant*, 146 Wn.2d 90, 101, 42 P.3d 1278 (2002) (Chambers, J., opinion).⁹ Thus, “[c]ounty prosecutors are invested by the State with a limited grant of power to represent the State of Washington to enforce the laws of the State within each prosecutor’s county. A prosecutor’s authority is . . . limited to the county the prosecutor serves.” *Id.* at 102.

⁸ In *State v. Reese*, 112 Wash. 507, 192 Pac. 934 (1920), the Supreme Court struck down as a violation of the vicinage requirement a statute that allowed crimes on railroad cars to be charged in any county through which the route of the train passed. Wash. Code § 2293 (Remington and Ballinger). As a result of this decision, Amendment 10 of the Constitution was adopted in 1922, which added language to article I, section 22, about routes traversed by a public conveyance. See also *State v. Graham*, 14 Wn. App. 1, 538 P.2d 821 (1975) (statute requiring habitual traffic offenders be tried in county where HTO status determined, not where driving occurred, was unconstitutional).

⁹ In *Bryant*, the defendant relied on a grant of immunity from King County prosecutors that covered acts allegedly occurring in Snohomish County. In a 2-4-3 decision, a divided Supreme Court held that Mr. Bryant’s statements given in response to King County’s immunity could not be used against him. However, only four justices agreed that King County’s immunity had state-wide effect. Five justices rejected that conclusion, although the lead 2-justice opinion concluded that due process would be violated by using Mr. Bryant’s statements and when those two votes were added to the four votes garnered by Justice Alexander, the result was reversal.

To be sure, there is some authority for the proposition that county prosecutors are able to level charges against defendants for acts in other counties, given the state-wide jurisdiction of superior courts. *See State v. Bryant*, 146 Wn.2d at 109 n.7 (Alexander, J., concurring). But even this conclusion is not certain. *See State v. Bryant*, 146 Wn.2d at 112 n. 9 (Owens, J. dissenting) (“I do not, however, agree with the majority’s statement that prosecutors in Washington have unrestrained authority to prosecute crimes committed in other counties.”).

In any case, the issue regarding the vicinage requirement is not whether Mr. Streiff could be tried in Lewis County for acts that allegedly occurred in Cowlitz County.¹⁰ This would be a “venue” issue, not than jurisdiction. Rather, there is a difference between “venue” and “vicinage”: “[V]enue and vicinage are logically distinct concepts. Venue refers to the location where the trial is held, whereas vicinage refers to the area from which the jury pool is drawn.” *Price v. Superior Court*, 25 P.3d at 622-23.

The vicinage requirement is such that its violation is essentially a structural error that defies a harmless error analysis. For instance, in *City of Bothell v. Barnhart*, *supra*, the Supreme Court upheld the reversal of a

¹⁰ Thus, Mr. Streiff is not arguing that the “to convict” instruction for Count III was erroneous. The error is not in the instructions, but in the jury pool composition.

conviction where jurors outside the county sat on the panel despite any question about their impartiality or the randomness in which they were selected. In contrast, where the only issue was a technical violation of the jury selection statute, and the jurors who were selected were in fact impartial and selected randomly, but were still “of the county,” the Court had no problem affirming. *See State v. Twyman*, 143 Wn.2d 115, 122, 17 P.3d 1184 (2001).

Barnhart means that the inclusion of one juror on a panel who does not reside in the county where the alleged crime took place is grounds for automatic reversal. And, because of the constitutional dimensions of this issue, it can be raised for the first time on appeal under RAP 2.5(a)(3).

Here, there is no question but that the jurors who sat on Mr. Streiff’s case were from Lewis County and were not residents of Cowlitz County. Mr. Streiff’s right to a jury “of the county” was violated in this case. The error is structural and Count III should be reversed.

c. The Trial Court Erred When It Denied the Motion to Dismiss Count III Based on Incorrect Venue

While Mr. Streiff’s trial lawyer did not raise a vicinage objection below, he did object to Count III being tried in Lewis County based upon

venue. The trial court erred when it denied Streiff's motion to dismiss that count.

Rooted in article I, section 22's and the Sixth Amendment's vicinage requirement, a defendant also has the right under CrR 5.1 to have criminal charges tried in the proper county:

CrR 5.1 applies to venue decisions. CrR 5.1(a) provides that an action shall be commenced either "(1) In the county where the offense was committed" or "(2) In any county wherein an element of the offense was committed or occurred." And where there is reasonable doubt whether an offense has been committed in one of two or more counties, the action may be commenced in any of the relevant counties. CrR 5.1(b).

But CrR 5.1(c) provides that if a case is filed under CrR 5.1(b) and there is reasonable doubt about where the offense occurred, the defendant "shall have the right to change venue to any other county in which the offense may have been committed."

State v. Stearman, 187 Wn. App. 257, 265-66, 348 P.3d 394 (2015).¹¹

Nothing in the joinder or consolidation rules authorizes joining counts for trial that occurred in different counties, CrR 4.3, and counts are not "related" if not in jurisdiction or venue of the same court. CrR 4.3.1. CrR 5.2(a) also provides: "The court shall order a change of venue upon motion

¹¹ "Venue is historically significant from a national perspective because . . . the pre-Revolutionary practice of transporting colonists who were charged with crimes in the colonies to either England or other English colonies for trial was among the principal complaints of the colonists against England." *Price v. Superior Court*, 25 P.3d at 623.

and showing that the action has not been prosecuted in the proper county.”

A trial court’s ruling on a change of venue motion is reviewed for an abuse of discretion, a standard that is met where the trial court bases its decision on an untenable ground or reason or “when it fails to make a necessary decision.” *Stearman*, 187 Wn. App. at 265. Further, given the constitutional rights involved, an erroneous denial of a change of venue motion is only harmless if “where *no* reasonable jury could have found that venue was proper by a preponderance of the evidence because *no* facts at trial established venue.” *Id.* at 272 (emphasis in original).¹²

In this case, there was not even a colorable claim that Count III occurred in Lewis County. The prosecutor conceded that the allegations arose solely in Cowlitz County. RP 6-7. While she argued that Count III was properly joined with Counts I and II, and argued for judicial efficiency, as

¹² A challenge to improper venue can be waived if not raised in a timely fashion. *See, e.g., State v. Price*, 94 Wn.2d 810, 816, 620 P.2d 994 (1980) (3 month delay after finding out venue was in wrong county was too long); *State v. Himple*, COA No.75298-7-I, 2018 Wash. App. LEXIS 77, 2018 WL 417982 (1/16/18) (unpub.) (waiver where probable cause certificate alleged acts occurred in Snohomish and King Counties); *State v. McCorkell*, 63 Wn. App. 798, 801, 822 P.2d 795 (1992) (challenge to venue must occur before jeopardy attaches -- before a jury is sworn in (or in a bench trial, when the first witness is sworn)). Here, Mr. Streiff objected to venue on Count III at the first opportunity after the State filed the Second Amended Information, and nothing in the affidavit of probable cause mentioned the Castle Rock allegations. CP 4-5.

noted, nothing in CrR 4.3 and 4.3.1 provides for joinder of counts from one county with counts arising outside of that county. On the other hand, CrR 5.2 *requires* a change of venue when the action is filed in the wrong county.

Accordingly, the trial court abused its discretion when it denied the motion to dismiss Count III based on improper venue. Given the absence of any information at trial that Count III occurred in Lewis County, this constitutional error cannot be said to be harmless. Reversal and dismissal of Count III is required.

2. *There Was Insufficient Evidence to Support Conviction for Count I*

a. Additional Facts

C.M.J. testified that when she was laying on the floor of the downstairs bedroom, around 6:00 a.m., she woke up as Mr. Streiff “started getting on top of me He started to kiss me” on her lips. RP 166-67, 183. She began to get up and he grabbed her hand and said to “come cuddle with him.” RP 167. She pulled her hand away and began leaving the room when she said she saw Mr. Streiff sitting on the floor staring to unzip his pants. RP 167, 189. The whole incident lasted about 30 seconds. RP 183. She exited the bedroom and went to the downstairs living room area and laid down on

the couch between two younger children. She tried to fall asleep, but she said Streiff again laid on top of her, “trying to find my lips to kiss me again but I had my head turned.” RP 168. His whole body weight was not on her as he was “bracing himself.” RP 188. He did not do anything with his hands, and she told him to get off and go away. He did not until her brother made a noise and he left. RP 168-69, 188.

b. Mr. Streiff Never Touched C.M.J.’s Sexual or Other Intimate Parts in Winlock

At most, Mr. Streiff laid on top of C.M.J. and kissed her on the lips. While this may be sufficient evidence for assault in the fourth degree, it not sufficient to sustain a conviction for child molestation in the third degree.

When reviewing a challenge to the sufficiency of the evidence, under the Due Process Clauses of the Fourteenth Amendment and article I, section 3, the test is whether, after viewing the evidence in the light most favorable to the State, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *State v. Green*, 94 Wn.2d 216, 221, 616 P.2d 628 (1980). This is a restrictive standard of review designed to protect people from being wrongfully convicted based upon a mere “modicum” of evidence and is a standard that requires the finder of fact to “to reach a subjective state of near certitude of the guilt of the accused.” *Jackson*

v. Virginia, 443 U.S. 307, 315 & 320, 99 S. Ct. 2781, 61 L.Ed.2d 560 (1979).

RCW 9A.44.089, third degree child molestation, requires that the defendant have “sexual contact with another” person between the age of 14 and 16. RCW 9A.44.010(2) defines “sexual contact” as “any touching of the sexual or other intimate parts of a person done for the purpose of gratifying sexual desire of either party or a third party.”

Regarding Count I (in Lewis County), C.M.J. made no allegation that Mr. Streiff touched her sexual parts – i.e., no touching of the genitals or breasts. However, the “term ‘intimate parts’ has been interpreted to have a broader connotation than sexual parts and include ‘parts of the body in close proximity to the primary erogenous areas . . .’ including the hips, buttocks, and lower abdomen.” *State v. Powell*, 62 Wn. App. 914, 917 n.3, 816 P.2d 86 (1991) (quoting *In re Adams*, 24 Wn. App. 517, 519-21, 601 P.2d 995 (1979)).

Kissing on the lips without more does not qualify. For instance, in *State v. R.P.*, 122 Wn.2d 735, 862 P.2d 127 (1993), the Supreme Court reversed a conviction for indecent liberties, which used the same statutory definition of “sexual contact” as the current child molestation statute. The defendant in *R.P.* picked up a girl, held her against her will, hugged and

kissed her, and sucked on her neck with his lips giving her a “hickey.” *Id.* at 736; *id.* at 737 (Andersen, J., dissenting). The Supreme Court reversed and dismissed that conviction for insufficient evidence of sexual contact. *Id.* at 736.

To be sure, kissing under some circumstances can support a conviction for child molestation where there is more than just lip-to-lip contact. For instance, in a pre-*R.P.* case, Division One appeared to suggest that kissing combined with touching between the legs and on the chest can constitute sexual contact. *State v. Allen*, 57 Wn. App. 134, 139, 788 P.2d 1084 (1990). Similarly, the insertion of a tongue during a kiss (so-called “French Kissing”) would seem to qualify.¹³

Here, however, there was simply kissing on the lips, without more – without the groping of sexual areas, and without “French Kissing.” This is insufficient evidence to satisfy the high standard to support a conviction under *Jackson v. Virginia*, *supra*, and the Due Process Clauses of the Fourteenth Amendment and article I, section 3. Count I should be reversed

¹³ See *State v. Stout*, 34 Kan. App. 2d 83, 114 P.3d 989, 993 (2005) (collecting “persuasive ... authorities from other jurisdictions which have recognized that a french kiss is an inherently sexual act generally resulting in sexual excitement and arousal”); *Altman v. State*, 852 So.2d 870, 875-76 (Fla. Dist. Ct. App. 2003) (“an ordinary person of common intelligence would understand that tongue-kissing a minor child is sexual contact”).

and dismissed.

3. *Mr. Streiff's Statements Should Have Been Suppressed*

a. Additional Facts¹⁴

Lewis County Sheriff's Deputy Andrew Scrivner interrogated Mr. Streiff at his home on October 21, 2018. Scrivner had limited experience as a police officer,¹⁵ but he had just taken a one-week class with the FBI and claimed to know, based upon someone's "body language," whether someone was deceptive or not. RP 115. Deputy Scrivner sat on a sofa across from Streiff who was sitting in a recliner. RP 123. Scrivner did not read Streiff *Miranda*¹⁶ warnings. Undisputed Fact 1.3, CP 82. Scrivner interrogated Mr. Streiff for 45 minutes. Undisputed Fact 1.4, CP 82.

At first, Scrivner talked about Streiff's life and work ("natural conversations") in an attempt to build rapport with him, just "man to man." RP 344. Then, Scrivner brought up the "hot questions" and confronted Streiff, asking "if he did something at the party that he may regret between

¹⁴ These facts come from both the CrR 3.5 hearing and Deputy Scrivner's trial testimony.

¹⁵ Scrivner had only graduated from the academy in 2014, just a few years before his interaction with Mr. Streiff. RP 338.

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

[K.L.W.] and [C.M.J.].” RP 345. At that point, the mood changed, and Streiff’s body posture and demeanor became defensive. As the interrogation continued, Streiff slowly got more upset, trying to close himself off from Scrivner and create distance with him. RP 127, 133, 364. Although Streiff kept denying that he would have molested children, he said he had a lot to drink, had blacked out and did not remember much. RP 128-29.

Even though Streiff kept saying he was not going to admit to something he did not remember doing, Scrivner persistently kept asking him whether he had inappropriate contact with the girls “a significant amount of times, multiple times, rephrasing it in a different way.” RP 346. About halfway through the interview, Streiff asked Scrivner to stop asking him questions about whether he touched “the little girl inappropriately.” Scrivner did not respect Streiff’s request and “continued to question” about the incident but changed the words he was using. RP 133-34. Scrivner told Streiff that “if he continued down this path to not tell the truth that it’s going to be difficult for them ever to forgive him.” RP 347.

The trial court found that “[t]hroughout the interview, Deputy Scrivner touched the Defendant’s shoulder and knee in a friendly manner for purposes of facilitating the conversation.” Undisputed Fact 1.5, CP 82. *See*

also RP 125, 129, 133, 346, 349. Streiff said that Scrivner's touchings were making him "really nervous:" he asked Scrivner to not touch him; and Scrivner stopped. RP 129, 346. When asked how many times he patted Streiff's shoulder, Scrivner said "I couldn't tell you, but it wasn't very often." RP 133. Finally, Streiff asked Scrivner to leave, but Scrivner did not immediately leave and continued to interrogate Streiff for a minute or two, telling Streiff "this is his opportunity and when I walk out he will no longer have an opportunity to talk to me." RP 134, 363.

The trial court ruled that the interrogation was not custodial, that all statements were voluntary, and admissible at trial. CP 82-83.

b. Because the Interrogation Was Custodial and Coercive, the Failure to Give *Miranda* Warnings Requires Suppression

Both the Fifth Amendment's and article I, section 9's protection of the right against self-incrimination requires the exclusion of statements elicited in a custodial interrogation unless the suspect was first issued warnings pursuant to *Miranda v. Arizona*, 384 U.S. 436, 444-45, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966). *Miranda* safeguards are required when a suspect is (1) "in custody" and (2) subject to "interrogation" by the government. *Id.* at 444. A suspect is in custody when "there is a 'formal arrest

or restraint on freedom of movement’ of the degree associated with a formal arrest.” *California v. Beheler*, 463 U.S. 1121, 1125, 103 S. Ct. 3517, 77 L. Ed. 2d 1275 (1983) (quoting *Oregon v. Mathiason*, 429 U.S. 492, 495, 97 S. Ct. 711, 50 L. Ed. 2d 714 (1977) (per curiam)).

When a suspect has not formally been taken into police custody, a suspect is nevertheless considered “in custody” if the suspect has been “deprived of his freedom of action in any significant way.” *Miranda*, 384 U.S. at 444. To determine whether the suspect was in custody, courts must first examine the totality of the circumstances surrounding the interrogation. *See Thompson v. Keohane*, 516 U.S. 99, 112, 116 S. Ct. 457, 133 L. Ed. 2d 383 (1995). “An objective test is used to determine whether a defendant was in custody – whether a reasonable person in the individual’s position would believe he or she was in police custody to a degree associated with formal arrest.” *State v. Lorenz*, 152 Wn.2d 22, 36-37, 93 P.3d 133 (2004). The standard of review of a trial court’s determination about custody is *de novo*. *Id.* at 36.

Although Deputy Scrivner claimed that his unwanted physical touchings of Mr. Streiff, both on his shoulder and leg, were merely “innocuous things”, or “friendly gestures,” a position adopted by the trial

court, Undisputed Finding 1.5, Conclusion 3.2, CP 83, these findings and conclusions are erroneous.

Scrivner had just taken a FBI interviewing class just a few days before he interrogated Streiff. RP 115, and the interview structure somewhat followed what is commonly called the nine-step “Reid Technique.”¹⁷ “Step 5” of the Reid Technique, “Getting the Suspect’s Attention,” involves “physical closeness” and “gestures of sincerity are used to establish attitude of understanding and concern.”¹⁸

Thus, Deputy Scrivner’s actions of reaching out and touching Mr. Streiff throughout the interrogation were not “friendly” or “an innocuous thing,” Undisputed Fact 1.5; Conclusion 3.2, CP 83, but were part of the method by which he was trying to extract a confession. His touching of Mr. Streiff in fairly intimate areas (shoulder and leg) was no more “friendly” than other instances where people in power and authority touch their subordinates’ bodies without their permission, and thus the trial court’s conclusions are insensitive to modern concepts of bodily integrity. The unwanted touchings

¹⁷ See generally B. Gallini, “Police ‘Science’ in the Interrogation Room: Seventy Years of Pseudo-Psychological Interrogation Methods to Obtain Inadmissible Confessions,” 61 *Hastings Law J.* 529 (2010).

¹⁸ “The Reid 9 Steps of Interrogation, in Brief,” [https://web.archive.org/web/20090330105018/http://faculty.law.wayne.edu/moran/The REID 9 STEPS OF INTERROGATION.htm](https://web.archive.org/web/20090330105018/http://faculty.law.wayne.edu/moran/The%20REID%209%20STEPS%20OF%20INTERROGATION.htm) (accessed 3/9/20).

here are similar to the proverbial “fist in a velvet glove.” *NLRB v. Exchange Parts Co.*, 375 U.S. 405, 409, 84 S. Ct. 457, 11 L. Ed. 2d 435 (1964).

In a Fourth Amendment context, one of the hallmarks of a coercive detention is “some physical touching of the person of the citizen.” *State v. Harrington*, 167 Wn.2d 656, 664, 222 P.3d 92 (2009) (quoting *United States v. Mendenhall*, 446 U.S. 544, 554-55, 100 S. Ct. 1870, 64 L. Ed. 2d 497 (1980) (plurality portion)). The same concepts apply here – when Deputy Scrivner laid his hands on Mr. Streiff, no reasonable person would think that the unwanted touchings were done as part of a “parental” comforting gesture. Once an officer touches someone without their permission during a structured interrogation, any reasonable person would no longer think they were not in custody and that they could get up and simply leave. Indeed, the fact that the officer was inside Streiff’s own home, without a warrant, would mean to any normal person that there was no longer a safe place to retreat to – there was no place to “leave” since Mr. Streiff’s most private place was now occupied by a police officer who not only was interrogating him but was physically touching him. Thus, Undisputed Finding 1.3’s (actually a conclusion of law) that Scrivner “did not arrest the Defendant” is wrong.

Other aspects of the interrogation support this conclusion. The interview began as a simple “man-to-man” conversation about Mr. Streiff’s work and life. However, Scrivner changed the tone and tenor of the encounter by repeatedly asking Mr. Streiff whether he molested the two girls, and persisted in repeatedly asking such questions even after Mr. Streiff (about halfway through the interrogation) told Scrivner he did not want to talk about it any more. As he kept asking the same questions in different ways, after Streiff said he no longer wanted to talk about it, Scrivner said that Streiff became more upset and tried to distance himself from Scrivner, but Scrivner then began his unwanted touchings of Streiff, and accusing him of not telling the truth.¹⁹ Nothing about this event in totality reveals a voluntary “normal” conversation between someone who would rationally think that they could end the conversation.

Accordingly, the interrogation was not only coercive and involuntary, contrary to Undisputed Fact 1.8 and Conclusion 4.1, but it was custodial, contrary to Conclusion 4.1. In the absence of *Miranda* warnings, the

¹⁹ The trial court ruled that Mr. Streiff was “able to end the interview effectively.” Conclusion as to Disputed Facts 3.1 and found that the interview lasted “until the Defendant told Deputy Scrivner he did not want to answer any more questions.” Undisputed Fact 1.4. There is a lack of substantial evidence to support these findings and conclusions as it is clear that by half-way through the interview, Mr. Streiff said he did not want to be interviewed about allegations of sexual assault but Dep. Scrivner persisted in asking questions anyhow and then engaged in the unwanted touchings.

statements should not have been admissible at trial and Conclusion 4.2 is in error.

There was prejudice by the admission of Scrivner’s testimony about Streiff’s custodial statements. Much of the deputy’s testimony was filled with descriptions of Mr. Streiff’s body language during the interrogation, suggesting that he was guilty because he crossed his arms and tried to diminish the physical space between them. RP 364. In closing, the prosecutor noted that when Scrivner questioned Streiff, “even at this point Jason doesn’t flat out deny it. He says he does not remember, he can’t admit to something that he does not remember.” RP 410. Accordingly, the admission of Mr. Streiff’s custodial statements violated the Fifth and Fourteenth Amendments and article I, section 9, and the convictions should be reversed.

4. *Prosecutorial Misconduct in Closing Requires Reversal*

a. Additional Facts

The State’s closing centered on the theme of “justice” and of holding Mr. Streiff “accountable,” even mocking his name:

These girls endured and their families endured with them through this process and not so for Jason Streiff to endure, not strife for Jason Streiff to face his actions. It’s time for him to

be held accountable for his actions. So at the conclusion of this trial, I am asking you to find him guilty of all counts.

RP 410 (emphasis added).

Defense counsel centered his argument on reasonable doubt and inconsistencies and contradictions in the testimony of the prosecution witnesses. Counsel noted that the issue was not what jurors emotionally felt to be the case, but, citing the “scales of justice,” they were to ignore feelings and what “your gut or heart tells you you want the truth to be and the State has to meet their burden. Their burden is here and if the facts aren’t there, if there’s doubt about truth, if there’s doubt about what happened . . . then your obligation, the oath you took as jurors, requires one outcome. That’s not guilty.” RP 421-22.

In rebuttal, the prosecutor returned to the “scales of justice”:

There’s scales of justice. As you heard, there’s a balance. And in this case I want you to put all the witnesses that came here and all the evidence that has been introduced and have been nine witnesses that testified and tenth person is the defendant himself who’s also apologizing and willing to turn himself in and that balance falls for justice. So I am asking you to find him guilty. . . .

RP 444. There was no objection to any of these arguments.

b. The Prosecutor’s Arguments About Holding Mr. Streiff “Accountable” Combined with the Misleading “Scales of Justice” Argument Require Reversal

“The right to a fair trial is a fundamental liberty secured by the Sixth and Fourteenth Amendments to the United States Constitution and article I, section 22 of the Washington State Constitution.” *In re Pers. Restraint of Glasmann*, 175 Wn.2d 696, 703, 286 P.3d 673 (2012). Prosecutorial misconduct may deprive a defendant of the constitutional right to a fair trial, which is protected by the Due Process Clauses of the Fourteenth Amendment and article I, section 3.²⁰ A new trial should be granted where a prosecutor’s conduct was both improper and prejudicial. *Glasmann*, 175 Wn.2d at 704. Even where a defendant does not object to improper argument, reversal is required if the misconduct was flagrant and ill-intentioned and incurable by an instruction. *State v. Emery*, 174 Wn.2d 741, 760-61, 278 P.3d 653 (2012).

Multiple instances of misconduct may result in an unfair trial, in violation of state and federal due process, requiring reversal even if each improper comment in isolation would not. “There comes a time . . . when the cumulative effect of repetitive prejudicial error becomes so flagrant that no

²⁰ See *Glasmann*, 175 Wn.2d at 703-04; *Young v. Konz*, 88 Wn.2d 276, 280, 558 P.2d 791 (1977), *aff’d on rehearing*, 91 Wn.2d 532, 588 P.2d 1360 (1979) (“Due process of the law requires a fair trial for each defendant.”).

instruction or series of instructions can erase it and cure the error.” *State v. Case*, 49 Wn.2d 66, 73, 298 P.2d 500 (1956).²¹

Here, the State’s argument combined two types of misconduct: (1) asking the jurors to hold Mr. Streiff “accountable,” and (2) misstating the burden of proof by its mistaken analogy to the “scales of justice” and urging conviction based upon “justice.”

At the outset, the jury’s function in our society is not to find defendants “accountable.” Rather, the function of the constitutional right to a jury trial under the Sixth and Fourteenth Amendments and article I, sections 21 and 22 is to *protect* defendants from the power of the state.²² Asking jurors to depart from their historic function to hold an accused person “accountable” is essentially an appeal to emotion, rather than reason.²³

²¹ See also *State v. Perez-Mejia*, 134 Wn. App. 907, 917, 143 P.3d 838 (2006) (reversing murder conviction because cumulative misconduct denied defendant a fair trial).

²² See *Alleyne v. United States*, 570 U.S. 99, 133 S. Ct. 2151, 186 L. Ed. 2d 314 (2013) (noting “the historic role of the jury as an intermediary between the State and criminal defendants”) (citing *Williams v. Florida*, 399 U.S. 78, 100, 90 S. Ct. 1893, 26 L. Ed. 2d 446 (1970) (“[T]he essential feature of a jury obviously lies in [its] interposition between the accused and his accuser”); *Duncan v. Louisiana*, 391 U.S. 145, 155, 88 S. Ct. 1444, 20 L. Ed. 2d 491 (1968) (“A right to jury trial is granted to criminal defendants in order to prevent oppression by the Government”). In this sense, the role of the jury is not to hold the defendant “accountable” – rather, the jury’s role is to hold the State “accountable.”

²³ See *State v. Neal*, 361 N.J. Super. 522, 826 A.2d 723, 734 (N.J. Sup. Ct. App. Div. 2003) (prosecutor’s repeated exhortations to the jury to hold the defendant

(continued...)

But the prosecutor here did not simply ask the jury to hold Mr. Streiff “accountable.” Rather, she told the jurors that given the scales of justice and the State’s witnesses, the “balance falls for justice.” RP 444. Courts have condemned such arguments as improper appeals to emotion.²⁴

Further, the argument that the weight of the evidence tipped the scales “for justice” – i.e. for conviction – misstated the burden of proof. Scales with equal weight on each side are in equipoise, and thus conviction under the State’s analogy would be the result if there was one iota more of evidence on the State’s side of the scales, hardly the reasonable doubt standard.²⁵

²³(...continued)

accountable constituted improper “send a message to the community” or “call to arms” comment, as it improperly diverted jurors’ attention from the facts of the case and was intended to promote a sense of partisanship with the jury that is incompatible with the jury’s function); *State v. Begin*, 2015 ME 86, 120 A.3d 97, 103 (2015) (“the State’s exhortation that the jury hold Begin ‘accountable’ improperly suggested to the jury that it had a civic duty to convict or that it should consider the broader societal implications of its verdict, and thereby detracted from the jury’s actual duty of impartiality.”). Compare *State v. Hoeg*, COA No. No. 72912-8-I, 2016 Wash. App. LEXIS 250, 2016 WL 790942 (1/29/16) (unpub.) (where defense argument urged jurors to find defendant not guilty based on sympathy, it was not misconduct for prosecutor to argument accountability).

²⁴ See *United States v. Young*, 470 U.S. 1, 18, 105 S. Ct. 1038, 84 L. Ed. 2d 1 (1985) (“The prosecutor was also in error to try to exhort the jury to ‘do its job’; that kind of pressure, whether by the prosecutor or defense counsel, has no place in the administration of criminal justice.”); *United States v. Mandelbaum*, 803 F.2d 42, 44 (1st Cir. 1986) (“Cases are to be decided by a dispassionate review of the evidence admitted in court. There should be no suggestion that a jury has a duty to decide one way or the other; such an appeal is designed to stir passion and can only distract a jury from its actual duty: impartiality.”).

²⁵ See *State v. Lindsey*, 180 Wn.2d 423, 434, 326 P.3d 125 (2014) (“Arguments by the prosecution that shift or misstate the State’s burden to prove the defendant’s guilt
(continued...)”)

These arguments were ill-intentioned and flagrant and should lead to reversal even though there was no objection below: “We do not focus on the prosecutor’s subjective intent in committing misconduct, but instead on whether the defendant received a fair trial in light of the prejudice caused by the violation of existing prosecutorial standards and whether that prejudice could have been cured with a timely objection.” *State v. Walker*, 182 Wn.2d 463, 478, 341 P.3d 976 (2015). In *Walker* and in *Glasmann*, the Court granted new trials despite objection below (and in *Glasmann*, on collateral review) where the State’s PowerPoint presentations in closing:

included altered exhibits, expressions of the prosecutor’s opinion on the defendant’s guilt, and clear efforts to distract the jury from its proper function as a rational decision-maker. *Glasmann* required the jury to analyze the “nuanced distinctions” between different degrees of offenses. *Id.* at 710. The issue at trial here was the extent, if any, of Walker’s involvement in the crimes, requiring the jury to make sense of a multistage criminal scheme with several participants playing separate roles. The State’s PowerPoint presentation obfuscated the complicated facts presented to the jury here at least as much as the presentation in *Glasmann* did. The State’s

²⁵(...continued)

beyond a reasonable doubt constitute misconduct.”); *State v. Warren*, 165 Wn.2d 17, 26, 195 P.3d 940 (2008) (“Due process requires that the State bear the burden of proving every element of the crime beyond a reasonable doubt. . . . A defendant is entitled to the benefit of a reasonable doubt. Whether a doubt exists and, if so, whether that doubt is reasonable may be subject to debate in a particular case. However, it is an unassailable principle that the burden is on the State to prove every element and that the defendant is entitled to the benefit of any reasonable doubt. It is error for the State to suggest otherwise.”).

misconduct here was so flagrant, pervasive, and prejudicial that it could not have been overcome with a timely objection and an instruction to the jury to disregard the improper slides.

Walker, 182 Wn.2d at 478-79.

The emotional appeal to the jury in this case, effectively, that “justice” required holding Mr. Streiff “accountable” similarly could not be cured by an instruction. Defense counsel’s argument was based on dissecting the various inconsistencies in the evidence, and urging a dispassionate assessment of the reasonable doubt standard. The State’s response was to blatantly misstate the burden of proof and urging conviction based upon an emotional sense of “justice.” Moreover, the misconduct in closing needs to be evaluated in conjunction with the misconduct discussed in the next section related to questions that assumed the conclusion of guilt.

Moreover, although the sufficiency of the evidence is not a proper factor to consider when examining whether an argument is flagrant or ill-intentioned, *see Walker*, 182 Wn.2d at 479, here, there was clear prejudice to Mr. Streiff, who contested the State’s witnesses at every turn, pointing out the inconsistencies in their testimony, and, on some levels, the absurdity of the some aspects of their testimony – that Mr. Streiff, for instance, would molest a teenager in front of her father without her father seeing or doing anything.

The State also failed to provide any type of motive for why Mr. Streiff, who apparently lacked any prior criminal history or proclivity to molest children, would suddenly, one day, molest the daughters of his longtime friends.

Accordingly, even though there was no objection below, the State's argument was flagrant and ill-intentioned, and caused prejudice. This Court should reverse the convictions.

5. *Mr. Streiff Was Unconstitutionally Convicted Based Upon Opinion and Conclusion Evidence and Improper Questions That Assumed His Guilt*

a. Additional Facts

Throughout the trial, sometimes over objection and sometimes without objection, the State asked questions and elicited answers that assumed Streiff had committed the charged offenses. For instance, the prosecutor asked Deputy Scrivner if he had received “a report regarding a child molestation,” and after he said he did, the prosecutor asked if he remembered “who reported that assault?” to which he said Christina Jackson. RP 339. Shortly after than Scrivner testified that he met with C.M.J. and “*I found out that she was at a birthday party in the early time of August – around August 11th and 12th and at this birthday party she was sexually assaulted by a gentleman named Jason Streiff.*” RP 339-40 (emphasis

added). He then he explained he contacted K.L.W. because “[d]uring my interview with [C.M.J.] *I found out that her cousin was also sexually assaulted at the same event.*” RP 340 (emphasis added). Scrivner also said that K.L.W. also had difficulties telling him what happened, but she said that “in the early morning she was awoke by Mr. Streiff who sexually assaulted her.” RP 342.

Deputy Scrivner also testified about the interrogation with Mr. Streiff, repeating the above-noted statements about Streiff’s body language. RP 344. He noted how after Streiff did not want to talk about what he could not remember, Streiff was “*essentially downplaying the crime itself.*” RP 346 (emphasis added). Scrivner told him that if he wanted the family to forgive him he needed to “be willing to tell me the truth or if *he continued down this path to not tell the truth* that it’s going to be difficult for them ever to forgive him.” RP 347 (emphasis added).

Finally, the prosecutor repeated throughout the examination of other witnesses questions and answers that assumed guilt by using conclusory

statements. Sometimes there were objections, and sometimes not, and sometimes the objections were sustained and other times not.²⁶

b. Both the Prosecutor’s Questions and the Witnesses’ Answers Improperly Assumed Guilt

A witness’ testimony which either directly or by inference gives his or her opinion that the person on trial is guilty is inadmissible. The determination of guilt or innocence is strictly a question for the jury.²⁷ “No witness, lay or expert, may testify to his opinion as to the guilt of a defendant, whether by direct statement or inference.” *State v. Black*, 109 Wn.2d 336, 348, 745 P.2d 12 (1987). Similarly, “[a] witness’s expression of personal belief about the veracity of another witness is inappropriate opinion testimony in criminal trials.” *State v. Perez-Valdez*, 172 Wn.2d 808, 817, 265 P.3d 853 (2011). Particularly when given by a law enforcement officer,

²⁶ See RP 213 (prosecutor asked Christina twice about whether prior to October 19, she knew that “Jason also assaulted [K.L.W.]?”); RP 237 (same question to Brandon); RP 258 (question to Sadie Parsons about C.M.J. telling her “what happened”); RP 283-84 (questions to K.L.W. about finding out about that C.M.J. was “also assaulted.”); RP 285, 317 (prosecutor asks about whether behavior changed “after the assault” or “since the assault”); RP 316 (Clara Winter states that she thought Mat and Brandon were discussing “my daughter’s assault and they weren’t); RP 328 (prosecutor’s questions to Mat about what “Jason had done to [K.L.W.]” or what “had happened to [C.M.J.]”).

²⁷ See *State v. Garrison*, 71 Wn. 2d 312, 315, 427 P.2d 1012 (1967); *State v. Christopher*, 114 Wn. App. 858, 862-63, 60 P.3d 677 (2003); *State v. Farr-Lenzini*, 93 Wn. App. 453, 459-64, 970 P.2d 313 (1999); *State v. Sargent*, 40 Wn. App. 340, 351, 698 P.2d 598 (1985).

opinions on the ultimate issue of guilt deprive a defendant of a fair trial. This is because testimony by the police may carry a special aura of trustworthiness. *State v. Demery*, 144 Wn.2d 753, 763, 30 P.3d 1278 (2001).

“A prosecutor may not express his personal opinion of the credibility of witnesses or the guilt or innocence of the accused.” *State v. Calvin*, 176 Wn. App. 1, 19, 316 P.3d 496 (2013) (citing *State v. Reed*, 102 Wn.2d 140, 145, 684 P.2d 699 (1984)). “[A] prosecutor may commit misconduct by asking questions designed to elicit improper opinion testimony . . . the focus in determining whether prosecutorial misconduct occurred is the question asked and not the response given.” *State v. Morrill*, COA No. 50070-1-II, 2019 Wash. App. LEXIS 351 at *13, 2019 WL 589930 (2/13/19) (unpub.) (citing *State v. Padilla*, 69 Wn. App. 295, 299, 846 P.2d 564 (1993)).

Accordingly, opinion and conclusion testimony by witnesses or questions by a prosecutor that assume guilt are irrelevant and prejudicial under ER 401-403 and ER 701, and violate due process and the right to a jury trial, protected by the Sixth and Fourteenth Amendments and article I, sections 3, 21 and 22. The issues are constitutional and thus can be raised for the first time on appeal under RAP 2.5(a)(3). *See State v. Kirkman*, 159 Wn.2d 918, 927, 155 P.3d 125 (2007).

In this case, the prosecutor asked questions that assumed Mr. Streiff had actually committed sexual assaults, and a series of witnesses, including a police officer, gave conclusions that Mr. Streiff had actually committed sexual assaults. The officer also testified as to his opinion that Streiff was not truthful when denying he did anything wrong (or that he could not remember) and that he was “downplaying the crime.” Although some leeway is to be expected during a trial, a police officer cannot constitutionally testify “*I found out that she was at a birthday party in the early time of August – around August 11th and 12th and at this birthday party she was sexually assaulted by a gentleman named Jason Streiff,*” RP 339-40 (emphasis added), nor can a police officer testify that he told the defendant, who denied committing a crime, that he was not telling the “truth,” RP 347, nor can a prosecutor repeatedly start out key questions to witnesses assuming that in fact a “child molestation” or an “assault” had taken place. RP 213, 237, 284, 317, 339.

In light of Mr. Streiff’s denial that he committed any crime, this conclusion and opinion testimony, and the prosecutor’s misconduct in asking questions assuming guilt, should lead to a new trial. In this regard, the prosecutorial misconduct connected to the conclusory questions asked by the

prosecutor in this case must be analyzed in conjunction with the misconduct in closing argument, discussed above. The combined effect requires reversal.

6. *By Using Pseudonyms and Birth Dates, Instructions 5, 6 and 7 Violated Multiple Constitutional Rights*

a. Additional Facts

The trial court’s “to convict” instructions for all three counts (Instructions Nos. 5, 6 and 7) used pseudonyms for the two complaining witnesses (C.M.J. in Instructions No. 5 and 7, and K.L.W. in Instruction No. 6), and also stated their alleged birth dates (6/16/2004 in Instructions No. 5 and 7, and 12/20/2002 in Instruction No. 6). CP 57-59 (App. B). Defense counsel did not except to these instructions. RP 382.

b. The Use of Initials and the Inclusion of Birth Dates in the Instructions Violated the Right to an Open and Public Trial, Reduced the Burden of Proof and Constituted a Comment on the Evidence

In general, the use of pseudonyms in our courts is to be discouraged.²⁸ In *John Doe G v. Dep’t of Corr.*, 190 Wn.2d 185, 198-99, 410 P.3d 1156 (2018), the Supreme Court held that before pseudonyms can be used a court is required to go through the same analysis as that required to seal court

²⁸ Division One once chose not to use a minor child’s initials because of the depersonalizing aspects of that practice. See *In re Dependency of Lee*, 200 Wn. App. 414, 419 n. 1, 404 P.3d 575 (2017).

records or to close proceedings under article I, section 10, of the Washington Constitution, GR 15, and the five-step framework set out in *Seattle Times Co. v. Ishikawa*, 97 Wn.2d 30, 37-39, 640 P.2d 716 (1982).²⁹

Additionally, a criminal defendant has a state and federal constitutional right to a public trial,³⁰ while the First Amendment also requires that pseudonyms not be used except in extraordinary circumstances: “We recognize that the identity of the parties in any action, civil or criminal, should not be concealed except in an unusual case, where there is a need for the cloak of anonymity.” *United States v. Doe*, 655 F.2d 920, 922 n.1 (9th Cir. 1980).³¹

²⁹ The Court held:

Ishikawa requires the court to (1) identify the need to seal court records, (2) allow anyone present in the courtroom an opportunity to object, (3) determine whether the requested method is the least restrictive means of protecting the interests threatened, (4) weigh the competing interests and consider alternative methods, and (5) issue an order no broader than necessary.

John Doe G., 190 Wn.2d at 199. *See also Doe L. v. Pierce County*, 7 Wn. App. 2d 157, 201-02, 433 P.3d 838 (2018) (original court records using pseudonyms are “sealed” under GR 15, requiring an *Ishikawa* analysis).

³⁰ *State v. Lormor*, 172 Wn.2d 85, 90-92, 257 P.3d 624 (2011); U.S. Const. amends. VI & XIV; Wash. Const. art. I, § 22.

³¹ *See also United States v. Doe*, 870 F.3d 991, 996-1002 (9th Cir. 2017) (discussing qualified First Amendment right of access to court documents, but finding compelling interests in sealing of cooperation documents).

These are not new principles. In 1993, our Supreme Court declared unconstitutional under article I, section 10, a state statute, Laws of 1992, ch. 188, § 9, that required courts to ensure that information identifying child victims of sexual assault was not disclosed to the public or press during the course of judicial proceedings or in any court records. *Allied Daily Newspapers v. Eikenberry*, 121 Wn.2d 205, 848 P.2d 1258 (1993).³²

The use of pseudonyms can also cause prejudice to the defendant. *See Doe v. Cabrera*, 307 F.R.D. 1, 10 (D.D.C. 2014) (pseudonym can be “a subliminal comment on the harm the alleged encounter with the defendant has caused the plaintiff.”).³³ The use of a pseudonym constitutes a comment on the evidence, in violation of article IV, section 16, because the practice “conveys to the jury a judge’s personal attitudes toward the merits of the case or allows the jury to infer from what the judge said or did not say that the judge personally believed the testimony in question.” *State v. Swan*, 114

³² *See also Hundtofte v. Encarnación*, 181 Wn.2d 1, 330 P.3d 168 (2014) (plurality) (error to redact the full names of the defendants from SCOMIS indices even though they were wrongfully sued for unlawful detainer).

³³ *See also Doe v. Rose*, CV-15-07503-MWF-JCX, 2016 U.S. Dist. LEXIS 188804 at * 7 (C.D. Cal. 2016) (unpub.) (copy attached in App. D per GR 14.1) (precluding use of pseudonym at trial in sexual assault case determining that, beyond a “subliminal suggestion,” use of a pseudonym “is perhaps more accurately characterized as an overt suggestion” that the alleged harm occurred, the prejudice of which could not be overcome even by a limiting instruction).

Wn.2d 613, 657, 790 P.2d 610 (1990). Such an instruction also weakens the State's burden of proving guilt beyond a reasonable doubt to a jury and is equivalent to a mandatory presumption and direct verdict in violation due process and the right to a jury trial.³⁴

Just as the use of a pseudonym in instructions can telegraph to the jury the judge's feelings, thereby weakening the burden of proof and constituting a comment on the evidence, so too does instructing a jury in a child molestation case, where age is an element, that the complaining witness's birth date is "6/16/2004" or "12/20/2002." In *State v. Jackman*, 156 Wn.2d 736, 132 P.3d 136 (2006), our Supreme Court reversed child sex convictions where the jury instructions contained the complainants' dates of birth consistent with their trial testimony:

By stating the victims' birth dates in the instructions, the court conveyed the impression that those dates had been proved to be true. Absent the instructions, the jury would have had to

³⁴ U.S. Const. amends. VI & XIV; Const. art. I, § 3, 21 & 22. See, e.g., *State v. Becker*, 132 Wn.2d 54, 65, 935 P.2d 1321 (1997) (special verdict form that constituted a comment on the evidence "was tantamount to a directed verdict"); *Carella v. California*, 491 U.S. 263, 265-66, 109 S. Ct. 2419, 105 L. Ed. 2d 218 (1989) (instructions that required the jury to presume a mental state violated due process); *United States v. Martin Linen Supply Co.*, 430 U.S. 564, 572-73, 97 S. Ct. 1349, 51 L. Ed. 2d 642 (1977) ("[A] trial judge is prohibited from entering a judgment of conviction or directing the jury to come forward with such a verdict."); *Smith v. Curry*, 580 F.3d 1071 (9th Cir. 2009) (habeas relief granted where judge coerced verdict from hung jury by commenting on the evidence and using mandatory language).

consider whether it believed the evidence presented at trial with respect to the victims' birth dates.

Id. at 744.³⁵

Instructions 5, 6 and 7 violated these principles. At the outset, the instructions were flawed by the fact they contained the birth dates for the two complainants. CP 57-59. As in *Jackman*, this constituted a comment on the evidence and essentially directed the verdict on that element in favor of the State, weakening the burden of proof and violating the rights to a jury trial and due process of law under the Sixth and Fourteenth Amendments and article I, sections 3, 21 and 22. Moreover, the instructions used pseudonyms in the written jury instructions without engaging in the balancing test required by *Seattle Times Co. v. Ishikawa, supra*, nor was there ever any argument that using initials in the instructions was in any way necessary, nor did the court ask the public for input, violating the First, Sixth and Fourteenth Amendments and article I, sections 10 and 22.³⁶

³⁵ See also *State v. Becker*, 132 Wn.2d 54, 64-65, 935 P.2d 1321 (1997) (use of the term "school" in a special verdict form was a comment on the evidence since the issue to be decided by the jury was whether there was in fact a "school").

³⁶ To be sure, an argument could have been made to use pseudonyms in the instructions, but such an argument was not made to the trial court here, and on appeal it is inappropriate to engage in such *post hoc* balancing. See *State v. Wise*, 176 Wn.2d 1, 12-13, 288 P.3d 1113 (2012) ("We do not comb through the record or attempt to infer the trial court's balancing of competing interests where it is not apparent in the record.").

The use of pseudonyms in the jury instructions (a sealing) constituted reversible structural error in and of itself. *See, e.g., State v. Wise*, 176 Wn.2d 1, 16-18, 288 P.3d 1113 (2012).³⁷ And because of the constitutional nature of the illegal sealing, this is an issue that can be raised for the first time on appeal under RAP 2.5(a)(3). *Wise*, 176 Wn.2d at 9.

Similarly, the inclusion of the birth dates in the jury instructions constituted a comment on the evidence and weakened the burden of proof, in violation of due process, the right to a jury trial and the right to be free from comments on the evidence, protected by the Sixth and Fourteenth Amendments and article I, sections 3, 21 and 22 and article IV, section 16. Again, because of the constitutional nature of the error, the issues are properly addressed for the first time on appeal. *See Jackman*, 156 Wn.2d at 741 (“Jackman did not object to the instructions at trial, and the court gave the instructions to the jury exactly as proposed by the State.”).

While the illegal sealing is structural error, there is some authority that the judge inserting birth dates into the instructions can, under some

³⁷ Division One rejected such arguments in a recent unpublished opinion. *State v. Staples*, COA No. 78460-9-I, 2019 Wash. App. LEXIS 3225, 2019 WL 7373500 (12/30/19) (unpub.), *pet. pending* Sup. Ct. No. 982104 (2020). With all due respect, *Staples*' analysis is flawed as it failed to cite, let alone distinguish, the Supreme Court's holding in *John Doe G v. Dep't of Corr.*, *supra*, that the use of pseudonyms is equivalent to a sealing.

circumstances, be harmless. *See State v. Zimmerman*, 135 Wn. App. 970, 975, 146 P.3d 1224 (2006) (“Critical to our conclusion is the fact that Zimmerman is J.C.’s biological father and, even though he denied molesting her, he knew and never disputed knowing her age.” *Id.* at 975.³⁸

With all due respect, this analysis is incorrect and should not be followed. When a judge tells the jury facts that resolve an element upon which the State has the burden of proof, this is really no different than a mandatory presumption, and in the face of a mandatory presumption, it is improper for an appellate court to “find facts” as a way to avoid reversal. *See Carella v. California*, 491 U.S. 263, 267-68, 109 S. Ct. 2419, 105 L. Ed. 2d 218 (1989) (Scalia, J., concurring).

Nonetheless, the error was not harmless in this case. In *Jackman*, the Supreme Court reversed even though the four complainants testified about their correct birth dates, there was corroborating evidence for three of them and the defendant never challenged the *fact* of minority. *Jackman*, 156 Wn.2d at 745. Because the fact of minority was a “threshold issue without which there was no crime,” and *Jackman* never “admitted or stipulated to their ages . . . it is still conceivable that the jury could have determined that

³⁸ *See also State v. Alvarez*, COA No. 35567-5-III, 2019 Wash. App. LEXIS 2768 at *18, 2019 WL 5566355 10/29/19) (unpub.).

the boys were *not* minors at the time of the events, if the court had not specified the birth dates in the jury instructions.” *Id.* (emphasis in original). Similarly, Mr. Streiff put on no evidence and did not testify. His closing argument contested all aspects of the State’s case, and never conceded any element had been proven. RP 411-436. Thus, the errors cannot have been harmless, and in conjunction with the structural error of the improper sealing, the convictions should be reversed.

7. *Mr. Streiff’s Sentence Was Incorrectly Calculated*

a. Additional Facts

C.M.J. alleged that Mr. Streiff kissed her on the lips in Winlock in the morning of August 12, 2018, and then claimed that Mr. Streiff groped at her on the couch in front of her father in Castle Rock a few hours later on the same date. Based on these two allegations, the State charged Mr. Streiff with two counts of child molestation in the third degree, Counts I and III.

The “to convict” instructions for these two counts were identical except for two differences. First, Count I required the jury to find that the acts occurred in “the County of Lewis, State of Washington,” while Count III allowed for conviction if the acts occurred in the “State of Washington.” CP 57, 59. Second, the charging periods overlapped: Count I required that the

sexual contact take place “on or about and between August 11th, 2018 and August 12th, 2018,” while Count III stated only “on or about August 12th, 2018.” CP 57, 59.

When imposing sentence, the trial court calculated the sentence for each count by using Counts I and III as separate current offenses, and thus the offender score on each count was “6” with a standard range of 41-54 months, rather than 15-20 months if the offender score was “3.” CP 85. The court imposed 54 months on each count, to run concurrently. CP 86. The court imposed 36 months of community custody. CP 87. The court also checked a box on the judgment stating that Mr. Streiff “is a sex offender subject to indeterminate sentencing under RCW 9.94A.507.” CP 85.

b. Mr. Streiff Is Not Subject to Indeterminate Sentencing

The trial court checked a box on the judgment that Mr. Streiff is subject to indeterminate sentencing. CP 85. This is an error. Child molestation in the third degree is not within the list of charges in section of RCW 9.94A.507. Accordingly, the judgment should be amended so that this provision is stricken.³⁹

³⁹ “[I]llegal or erroneous sentences may be challenged for the first time on appeal.” *State v. Crow*, 8 Wn. App. 2d 480, 512, 438 P.3d 541, *review denied* 193 Wn.2d 1038 (continued...)

c. **The Maximum Amount of Community Custody that Could Be Imposed Was Six Months**

For all three counts, trial court imposed determinate sentences of 54 months in prison, and then ordered community custody for 36 months. CP 86-87. This term of community custody is illegal and the issue can be raised for the first time on appeal.⁴⁰

A term of confinement, combined with a term of community custody, cannot exceed the statutory maximum for the crime as provided in RCW 9A.20.021; the trial court must reduce the term of community custody if the combined total is beyond the maximum sentence. RCW 9.94A.701(9); *State v. Boyd*, 174 Wn.2d 470, 472-73, 275 P.3d 321 (2012).

Child molestation in the third degree is Class C felony, with a maximum sentence of five years. RCW 9A.20.021(1)(a)(c); RCW 9A.44.089. Thus, if the court properly imposed 54 months per count, the court only had the power to impose an additional six months of community custody, not 36 months. 36 months exceeds the statutory maximum by 30 months. This term for community custody therefore is illegal the case should

³⁹(...continued)
(2019).

⁴⁰ See n. 39, *supra*.

be remanded for resentencing within the maximum or reduction of the term of community custody. *Boyd*, 174 Wn.2d at 473.

d. Imposition of Separate Punishments for Counts I and III Violates Double Jeopardy

The double jeopardy clause of the U.S. Constitution provides that no individual shall “be twice put in jeopardy of life or limb” for the same offense. U.S. Const. amend. V (as incorporated by U.S. Const. amend. XIV). *See also* Const. art. I, § 9. The right to be free from double jeopardy is violated where a person is convicted of offenses identical in fact and in law. *State v. Freeman*, 153 Wn.2d 765, 777, 108 P.3d 753 (2005). To prevent multiple convictions from violating double jeopardy, the jury must unanimously agree that at least one separate act constitutes a particular charged offense. *State v. Noltie*, 116 Wn.2d 831, 842-43, 809 P.2d 190 (1991). If the jury is not instructed that it must find each count represents a separate and distinct act from all other counts, double jeopardy may be violated. *See State v. Mutch*, 171 Wn.2d 646, 662-63, 254 P.3d 803 (2011); *State v. Carter*, 156 Wn. App. 561, 568, 234 P.3d 275 (2010) (reversing three counts of rape in same charging period due to lack of “separate and distinct” jury finding).

Mr. Streiff's trial counsel did not object to the calculation of the sentence and did raise a double jeopardy analysis. Nonetheless, it is still appropriate to review a claim of double jeopardy for the first time on appeal under RAP 2.5(a). *State v. Jackman*, 156 Wn.2d at 746.

In this case, the jury was given essentially identical "to convict" instructions for Counts I and III, which allowed for conviction for the same conduct of kissing C.M.J. in Winlock in the morning of August 12, 2018. While the jury was told that, for jury unanimity purposes, "[t]o convict the defendant *on any count* of Child Molestation in the Third Degree, one separate and distinct act of Child Molestation in the Third Degree must be proved beyond a reasonable doubt," Inst. No. 11, CP 63 (emphasis added), the jury was never told that *as between each count*, it needed to base its verdict on a separate and distinct act. Similarly, Instruction 10's "separate crime" instruction, CP 62, simply requires the jury to decide each count separately, but does not require separate and distinct acts as a basis for each count.

Thus, as between Count I and Count III, if the jury did not find that the State had proven that Mr. Streiff had molested C.M.J. in front of her father in Castle Rock on August 12, 2018, there was nothing in the jury

instructions preventing the jury from convicting Mr. Streiff of child molestation in Count III based on C.M.J.'s allegations of being kissed in Winlock on the same date. The inclusion of "State of Washington" in Instruction No. 7 did not preclude conviction for the Winlock allegation.⁴¹

As for the date differences between Counts I and III, both Instructions Nos. 5 and 7 used "on or about" language to describe the charging period. "On or about" is a flexible term and encompasses conduct, particularly in sex cases, beyond a narrow window to allow for "proof of the act at any time within the statute of limitations, so long as there is no defense of alibi." *State v. Yallup*, 3 Wn. App. 2d 546, 553-54, 416 P.3d 1250 (2018) (quoting *State v. Hayes*, 81 Wn. App. 425, 432, 914 P.2d 788 (1996)). "Where the [information] alleges that an offense allegedly occurred 'on or about' a certain date, the defendant is deemed to be on notice that the charge is not limited to a specific date." *State v. Brooks*, ___ Wn.2d ___, 455 P.3d 1151, 1156 (2020) (quoting *State v. Statler*, 160 Wn. App. 622, 640-41, 248 P.3d 165 (2011) (internal quotations omitted)).

⁴¹ Count I could not have been based on the allegation of molestation in Castle Rock as that town is not in Lewis County, but Count III was not limited to alleged acts outside of Lewis County.

In light of the use of such similar language in the instructions here, it is not clear from the jury verdicts which acts were the basis of conviction in Count I and which were the basis for conviction in Count III. Without a jury instruction that each count had to be based on separate and distinct conduct, it cannot be said that the jury separated out each count.⁴²

“While the reviewing court looks to the entire record, review is ‘rigorous and is among the strictest’ to protect against double jeopardy. *Mutch*, 171 Wn.2d at 664. It must be ‘manifestly apparent’ from the record, testimony, and argument that the two identical charges are based on separate acts. *Mutch*, 171 Wn.2d at 664.” *State v. Robinson*, 8 Wn. App. 2d 629, 638, 439 P.3d 710 (2019) (emphasis and internal quotations omitted). Although the State argued to the jury that Count I was based on the Winlock allegations and Count III was based on the Castle Rock allegations, conviction on both counts was not necessarily assured as the level of proof for Count III was much weaker than Count I – for Count III, the jury had to accept the fairly counter-intuitive proposition that Mr. Streiff molested C.M.J. as her father was seated nearby playing video games. But if the jurors had a reason to

⁴² See *State v. Fuentes*, 179 Wn.2d 808, 824, 318 P.3d 257 (2014) (jury instructions may result in a double jeopardy violation if they allow a jury to convict a defendant on multiple counts based on a single act).

doubt Count III, they could have still convicted Mr. Streiff in Count III for exactly the same conduct as alleged in Count I based on what C.M.J. claimed to have occurred in Winlock in “the State of Washington” on August 12, 2018. Accordingly, conviction and sentencing for both Counts I and III violated double jeopardy, U.S. Const. amends. V & XIV & Const. art. I, § 9. One count should be dismissed, and the case remanded for resentencing with an offender score of “3” and standard range of 15-20 months.

8. Trial Counsel Was Ineffective

Mr. Streiff had the right to effective assistance of counsel. U.S. Const. amends. VI & XIV; Const. art. I, § 22; *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L.Ed.2d 674 (1984). While counsel is not expected to perform flawlessly, counsel is required to meet an objectively reasonable minimum standard of performance. *Id.* at 688. Deficient performance occurs when counsel fails to make the appropriate objections⁴³ or fails to object to improper instructions or proposes wrong instructions.⁴⁴ Under *Strickland*, to show prejudice, petitioners need not prove that “counsel’s deficient conduct more likely than not altered the outcome in the case,” but rather only must

⁴³ See *State v. Saunders*, 91 Wn. App. 575, 578-80, 958 P.2d 364 (1998).

⁴⁴ See *State v. Kylo*, 166 Wn.2d 856, 861-71, 215 P.3d 177 (2009).

demonstrate there is a “reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.” *Strickland*, 466 U.S. at 693-694.

In this case, Mr. Streiff will likely file a PRP to raise non-record-based ineffectiveness by trial counsel – counsel told the trial court a week before trial that he was unprepared to try this case. RP (7/18/19) 2-9; CP 16-17. Nonetheless, the record is missing evidence of prejudice and therefore such evidence will have to be raised in a collateral attack proceeding. *State v. McFarland*, 127 Wn.2d 322, 337-38, 899 P.2d 1251 (1995). Because Mr. Streiff will raise separate ineffectiveness issues in the PRP, he will not be barred from litigating the Sixth Amendment violation in that proceeding because he has raised other record-based IAC issues here. *In re Pers. Restraint of Khan*, 184 Wn.2d 679, 689, 363 P.3d 577 (2015).

Here, the record reveals a failure of trial counsel to raise a vicinage objection (or if he failed to object to venue at the right times or to renew the venue objection at the end of the case), to argue double jeopardy for Counts I and III, to object to a 36 month term of community custody or a finding that Streiff was subject to indeterminate sentencing. Trial counsel failed to except to the use of pseudonyms and the inclusion of birth dates in Instructions Nos.

5, 6, and 7. Counsel also failed fully to object to the questions and answers that were based on improper opinions and conclusions that Mr. Streiff was guilty and was not truthful with during the interrogation with Deputy Scrivner. Counsel also did not object to the prosecutorial misconduct during closing argument. These failures constitute deficient performance, which caused prejudice for the same reasons, set out above, that these errors were not harmless. The convictions should be reversed under *Strickland*.

9. Cumulative Error Requires Reversal

A defendant has a fundamental right to a fair trial, protected both by the right to a jury and due process of law under the Sixth and Fourteenth Amendments and article I, sections 3, 21 and 22. “[T]he fundamental right to a fair trial demands minimum standards of due process.” *State v. Gonzalez*, 129 Wn. App. 895, 905, 120 P.3d 645 (2005). Cumulative error can interfere with this right to a fair trial. *See State v. Cloud*, COA No. 46912-0-II, 2016 Wash. App. LEXIS 2108 at *1, 7-8 (8/30/16) (unpub.).

“Where, however, there are multiple trial errors, a balkanized [sic], issue-by-issue . . . review is far less effective than analyzing the overall effect of the errors in the context of the evidence introduced at trial against the defendant.” *United States v. Preston*, 873 F.3d 829, 835 (9th Cir. 2017)

(internal quotes and cites omitted). The test to determine if cumulative error requires reversal of a defendant's conviction is whether the totality of circumstances substantially prejudiced the defendant. *See In re Pers. Restraint of Cross*, 180 Wn.2d 664, 690, 327 P.3d 660 (2014).

Here, the Court should look at the cumulative effect of the above-noted errors and conclude that they substantially prejudiced Mr. Streiff in violation of the First, Fifth, Sixth and Fourteenth Amendments, and article I, sections 3, 9, 10, 21 and 22, and article IV, section 16. From the appeal to hold Mr. Streiff "accountable" and the misstatements of the burden of proof, to the endemic conclusions by witnesses and the prosecutor that Mr. Streiff sexually assaulted the two complainants, to the assumption of guilt by the use of their initials and birth dates in the instructions to the improper admission of Mr. Streiff's custodial statements, the combined effect of all of the errors pointed out above was to violate Mr. Streiff's constitutional rights to a fair jury trial and due process of law. The Court should reverse the convictions.

E. CONCLUSION

For the foregoing reasons, this Court should reverse the judgment and remand for dismissal of Counts I and III with prejudice, and for a new trial on Count II, or resentencing.

Dated this 20th day of March 2020.

Respectfully submitted,

s/ Neil M. Fox

WSBA NO. 15277

Attorney for Appellant

APPENDIX A



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FILED
Lewis County Superior Court
Clerk's Office
AUG 27 2019

Scott Tinney, Clerk
By _____, Deputy

**IN THE SUPERIOR COURT OF WASHINGTON STATE
IN AND FOR LEWIS COUNTY**

STATE OF WASHINGTON,

Plaintiff,

v.

JASON DONALD STREIFF,

Defendant.

NO. 18-1-00972-21

FINDINGS OF FACT AND CONCLUSIONS
OF LAW FOR 3.5 HEARING

THIS MATTER came before the Honorable James Lawler of the above-entitled Court for a 3.5 Hearing on July 23, 2019. The Defendant was present and represented by his attorney Joshua Baldwin. The State was present and represented by Deputy Prosecuting Attorney Silvia Irimescu. The Court considered the argument of the parties and the testimony of Deputy Andrew Scrivner of the Lewis County Sheriff's Office. The Court now makes the following Findings of Fact and Conclusions of Law:

UNDISPUTED FACTS

- 1.1 On October 21, 2018, Deputy Scrivner interviewed the Defendant at Defendant's residence.
- 1.2 The meeting with Deputy Scrivner was pre-arranged and when the Deputy arrived at his residence, the Defendant invited Deputy Scrivner inside his home.
- 1.3 Deputy Scrivner did not arrest the Defendant and did not read the Defendant his Miranda rights.
- 1.4 Deputy Scrivner interviewed the Defendant for approximately 45 minutes, until the Defendant told Deputy Scrivner he did not want to answer any more questions.

FINDINGS OF FACT AND
CONCLUSIONS OF LAW FOR 3.5
HEARING
Page 1 of 3

Lewis County Prosecuting Attorney
345 West Main Street
Chehalis, WA 98532-1900
Phone: (360) 740-1240 Fax: (360) 740-1497

- 1 1.5 Throughout the interview, Deputy Scrivner touched the Defendant's shoulder and
2 knee in a friendly manner for purposes of facilitating the conversation.
- 3 1.6 The Defendant told Deputy Scrivner that he did not want to be asked particular
4 questions.
- 5 1.7 During the interview, the Defendant explained his relationship with the victims and
6 the victims' families, what he did on the days of the alleged assaults, that he did
7 not remember molesting the two victims, that he had a lot to drink on the nights of
8 the alleged child molestations, and that he would not do something like that.
- 9 1.8 There was no coercion of the Defendant.

9 **DISPUTED FACTS**

- 10 2.1 The Defendant was in custody for Miranda purposes because the officer touched
11 him and continued to ask him questions.

11 **CONCLUSIONS AS TO DISPUTED FACTS**

- 12 3.1 The Defendant was able to end the interview effectively and he did that when he
13 asked the officer to leave.
- 14 3.2 The fact that the officer put his hand on Defendant's shoulder or on his knee was
15 an innocuous thing, not a threat of force or anything that would make the
16 statements involuntary.

16 **CONCLUSIONS ON ADMISSIBILITY**

- 17 4.1 The Defendant's statements were voluntary and noncustodial.
- 18 4.2 The Defendant's statements are admissible in the State's case in chief.
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1 DONE IN OPEN COURT this 27th day of August, 2019.

2
3 James W. Lawler
4 JAMES LAWLER, SUPERIOR COURT JUDGE

5 Presented by:

6 SLI

7 Silvia Irimescu
8 Deputy Prosecuting Attorney
9 WSBA # 50256

Approved as to Form:

Joshua Baldwin
Joshua Baldwin
Attorney for Defendant
WSBA # 7674

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12 Defendant

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APPENDIX B

No. 5

To convict the defendant of the crime of child molestation in the third degree, as charged in count I, each of the following elements of the crime must be proved beyond a reasonable doubt:

- (1) That on or about and between August 11th, 2018 and August 12th, 2018, the defendant had sexual contact with C.M.J. (DOB 06/16/2004);
- (2) That C.M.J. was at least fourteen years old but less than sixteen years old at the time of the sexual contact and was not married to the defendant;
- (3) That C.M.J. was at least forty-eight months younger than the defendant; and
- (4) That this act occurred in the County of Lewis, State of Washington.

If you find from the evidence that each of these elements has been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty.

On the other hand, if, after weighing all the evidence, you have a reasonable doubt as to any one of these elements, then it will be your duty to return a verdict of not guilty.

No. 6

To convict the defendant of the crime of child molestation in the third degree, as charged in count II, each of the following elements of the crime must be proved beyond a reasonable doubt:

- (1) That on or about August 12th, 2018, the defendant had sexual contact with K.L.W. (DOB 12/20/2002);
- (2) That K.L.W. was at least fourteen years old but less than sixteen years old at the time of the sexual contact and was not married to the defendant;
- (3) That K.L.W. was at least forty-eight months younger than the defendant; and
- (4) That this act occurred in the County of Lewis, State of Washington.

If you find from the evidence that each of these elements has been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty.

On the other hand, if, after weighing all the evidence, you have a reasonable doubt as to any one of these elements, then it will be your duty to return a verdict of not guilty.

No. 7

To convict the defendant of the crime of child molestation in the third degree, as charged in count III, each of the following elements of the crime must be proved beyond a reasonable doubt:

- (1) That on or about August 12th, 2018, the defendant had sexual contact with C.M.J. (DOB 06/16/2004);
- (2) That C.M.J. was at least fourteen years old but less than sixteen years old at the time of the sexual contact and was not married to the defendant;
- (3) That C.M.J. was at least forty-eight months younger than the defendant; and
- (4) That this act occurred in the State of Washington.

If you find from the evidence that each of these elements has been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty.

On the other hand, if, after weighing all the evidence, you have a reasonable doubt as to any one of these elements, then it will be your duty to return a verdict of not guilty.

APPENDIX C

JUROR QUESTIONNAIRE

Juror #:

Detach and return IMMEDIATELY to:
Lewis County Jury Coordinator

Term Begins:
Panel No:

Phone: (360) 740-2704

FAX: (360) 748-1639

Last Name		First Name		Middle Initial	
Round Trip Miles to Courthouse from Home (most direct route)			Years as a Resident of:		Lewis County = Washington State =
Prior Residence (City/State)			Are You Employed?		Spouse's Occupation
<input type="checkbox"/> Yes <input type="checkbox"/> No		IF YES, Your Type of Occupation		Your Prior Occupation	
Are you related to or a close friend of a Law Enforcement Officer?		Have you or any member of your immediate family been a PARTY to a lawsuit?			
<input type="checkbox"/> Yes <input type="checkbox"/> No		<input type="checkbox"/> Yes <input type="checkbox"/> No			
If YES, when and in what court?		If YES, when and in what court?			
Have you ever been convicted of a crime other than a traffic violation? <input type="checkbox"/> Yes <input type="checkbox"/> No Immediate family? <input type="checkbox"/> Yes <input type="checkbox"/> No (This is not a request for excusal from jury service, see other side) Describe any physical condition, such as a loss of hearing or sight, or a chronic ailment which may affect your ability to serve as a juror, or a condition requiring assistance or accessibility.					

Do you drive an automobile? <input type="checkbox"/> Yes <input type="checkbox"/> No Have you ever been a victim of crime? <input type="checkbox"/> Yes <input type="checkbox"/> No Have you ever been convicted of a felony? <input type="checkbox"/> Yes <input type="checkbox"/> No If yes, have you had your civil rights restored? <input type="checkbox"/> Yes <input type="checkbox"/> No	Are you a Lewis County resident? <input type="checkbox"/> Yes <input type="checkbox"/> No Are you a United States citizen? <input type="checkbox"/> Yes <input type="checkbox"/> No Are you at least 18 years of age? <input type="checkbox"/> Yes <input type="checkbox"/> No Can you communicate in English? <input type="checkbox"/> Yes <input type="checkbox"/> No *You are automatically disqualified if you answered "no" to any of the questions in the above column and you will not receive confirmation of this
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I certify that the foregoing statements are true to the best of my knowledge and belief, and I acknowledge receipt of the enclosed summons.

Date: _____

Signature: _____

DETACH HERE AND RETURN TOP PORTION. PLEASE COMPLETE BOTH SIDES.

APPENDIX D



Neutral

As of: March 19, 2020 11:04 PM Z

Doe v. Rose

United States District Court for the Central District of California

September 22, 2016, Decided; September 22, 2016, Filed

Case No. CV-15-07503-MWF-JCx

Reporter

2016 U.S. Dist. LEXIS 188804 *

Jane Doe v. Derrick Rose, et al.

Judges: MICHAEL W. FITZGERALD, U.S. District Judge.

Prior History: Doe v. Derrick, 2016 U.S. Dist. LEXIS 1913 (C.D. Cal., Jan. 7, 2016)

Opinion by: MICHAEL W. FITZGERALD

Counsel: [*1] For Jane Doe, a Pseudonym, Plaintiff: Brandon J Anand, LEAD ATTORNEY, Anand Law PC, Los Angeles, CA; Thaddeus Julian Culpepper, LEAD ATTORNEY, Culpepper Law Groupe, Alhambra, CA; Waukeen Q McCoy, McCoy Law Firm, P.C., San Francisco, CA.

For Derrick Rose, in Individual, Defendant: Courtney A Palko, Mark D Baute, LEAD ATTORNEYS, Baute Crochetiere and Gilford LLP, Los Angeles, CA; Laura E Robbins, CAAG - Office of the Attorney General, California Department of Justice, Los Angeles, CA.

For Randall Hampton, an Individual, Ryan Allen, an Individual, Defendants: Patrick M Maloney, LEAD ATTORNEY, The Maloney Firm APC, El Segundo, CA; Michael D Monico, PRO HAC VICE, Monico and Spevack, Chicago, IL; Scott J Krischke, PRO HAC VICE, Monico and Spevak, Chicago, IL.

Opinion

CIVIL MINUTES—GENERAL

Proceedings (In Chambers): ORDER GRANTING DEFENDANT ROSE'S MOTION TO PRECLUDE PLAINTIFF'S USE OF A PSEUDONYM AT TRIAL AND DENYING DEFENDANTS HAMPTON AND ALLEN'S MOTION TO STRIKE AS MOOT [192] [249]

Before the Court is Defendant Rose's Motion to Preclude Plaintiff's Use of a Pseudonym at Trial (the "Motion") (Docket No. 192), filed on August 22, 2016. Plaintiff [*2] submitted her Opposition (Docket No. 196) on August 29, 2016, and Defendant Rose submitted his Reply (Docket No. 220) on September 2, 2016. On September 15, 2016, Defendants Allen and Hampton filed a Motion to Strike Scandalous and False Allegations from Plaintiff's Opposition to Motion to Use Plaintiff's Name at Trial; and for Attorneys Fees

and Costs (Docket No. 249) (the "Motion to Strike"). The Court reviewed and considered the papers on the Motions, and held a hearing on **September 20, 2016**.

Defendant Rose's Motion is **GRANTED**. Plaintiff's use of a pseudonym at trial would unduly prejudice Defendant Rose. Further, the public's interest in disclosure is increased at trial. Finally, because Defendant Rose's motion is granted, Defendants Hampton and Allen's motion to strike is **DENIED as moot**.

I. BACKGROUND

In September 2015, Plaintiff Jane Doe filed a complaint in California Superior Court alleging that Defendants Derrick Rose, Randall Hampton, and Ryan Allen engaged in sexual intercourse with her without her consent, giving rise to various claims under California law, including sexual battery. (Docket No. 1 ¶ 1). The parties and the Court have referenced this alleged act as a "rape", [*3] although that term is used in California law for a particular crime. Plaintiff alleges that, as a result of the sexual battery, she has suffered severe emotional distress, humiliation, embarrassment, and anxiety. (Id. ¶ 59). On June 17, 2016, the Court denied Defendant Rose's motion for dismissal on account of Plaintiff's use of a pseudonym (the "June Order"). (Docket No. 99). The Court applied *Does I thru XXIII v. Advanced Textile Corp.*, 214 F.3d 1058, 1068 (9th Cir. 2000), to decide that Plaintiff would be permitted to use a pseudonym for all pretrial filings. (June Order at 6). The Court reserved for the pretrial conference the question of whether Plaintiff would be permitted to use a pseudonym at trial. (*Id.*).

II. DISCUSSION

In deciding whether to permit a party's use of a fictitious name, the district court must weigh the need for anonymity against any "prejudice to the opposing party and the public's interest in knowing

the party's identity." *Advanced Textile*, 214 F.3d at 1068. As the Court discussed in the June Order, courts generally permit alleged rape victims to use pseudonyms in pretrial proceedings. (June Order at 2-3 (citing, e.g., *Doe v. Blue Cross & Blue Shield United of Wis.*, 112 F.3d 869, 872 (7th Cir.1997); *Doe v. Cabrera*, 307 F.R.D. 1, 3 (D.D.C. 2014); *Doe v. Penzato*, No. CV-10-5154-MEJ, 2011 U.S. Dist. LEXIS 51681, 2011 WL 1833007, at *3 (N.D. Cal. May 13, 2011))). The Court also acknowledged, however, that "Plaintiff's anonymity could significantly prejudice Defendant [*4] Rose if this action were to progress to trial" in part because "the jury may interpret the Court's permission for Plaintiff to conceal her identity as a comment on the harm Defendants allegedly caused." (June Order at 6). Therefore, the Court proceeds to reconsider whether Plaintiff should be permitted to use a pseudonym at trial under the *Advanced Textile* framework.

A. Plaintiff's Need for a Pseudonym

"When a party requests 'Doe' status, the factors to be 'balance[d] . . . against the general presumption that parties' identities are public information,' are: '(1) the severity of the threatened harm; (2) the reasonableness of the anonymous party's fears; and (3) the anonymous party's vulnerability to such retaliation.'" *Doe v. Ayers*, 789 F.3d 944, 945 (9th Cir. 2015) (quoting *Advanced Textile*, 214 F.3d at 1068).

In its June Order, the Court determined that "[g]iven the public nature of this action, and the fame of Defendant Rose, forcing Plaintiff to abandon her anonymity could subject her to significant harassment and humiliation from the public." (June Order at 3). This concern continues to be true. Defendant Rose is an exceedingly famous athlete, and thus media attention will presumably increase as the trial date approaches. Plaintiff can reasonably fear that losing her anonymity [*5] will subject her to close scrutiny by media and the public. As an alleged rape victim,

Plaintiff may be particularly vulnerable to such scrutiny. *See Doe v. Blue Cross*, 112 F.3d at 872.

Defendant Rose's argument that Plaintiff "is not a minor who is a true victim of rape or assault" (Mot. at 10) is as unpersuasive as it is distasteful. Whether Plaintiff is truly a victim of rape is for the jury to decide, not this Court. Moreover, Plaintiff's age has little to do with whether she was truly raped, or whether she would be harmed by the harassment and publicity that is likely to result from increased public scrutiny. It is Plaintiff's status as an alleged rape victim, and Defendant's wealth and notoriety, that makes her particularly vulnerable to harassment. Accordingly, this factor weighs in favor of allowing Plaintiff to continue to proceed anonymously at trial.

Finally, the Court notes that it is extremely displeased by Defendant Rose's renewed implication that evidence Plaintiff was "sexually adventurous with [Defendant] Rose" and drank alcohol with Defendant Rose on the night in question in any way affects whether Plaintiff consented to group sex with Defendants Rose, Allen, and Hampton later that night. (*See* Mot. [*6] at 3). The Court previously made clear to Defendant Rose that such rhetoric is unworthy of this Court. (June Order at 4). That the Court now grants Defendant Rose's motion to preclude Plaintiff's use of a pseudonym at trial is in no way an invitation to continue his attempts to prejudice Plaintiff in this way. If Defendant Rose continues to utilize language that shames and blames the victims of rape either in his motion practice or before the jury, the Court will consider sanctions.

B. Prejudice to Defendant Rose

The Court previously held that Defendant Rose was unlikely to be prejudiced by Plaintiff's use of a pseudonym in pretrial proceedings because he would be permitted to use Plaintiff's name in discovery and would not be prevented from publicly telling his side of the story. Defendant Rose now argues that the likelihood of prejudice

will greatly increase if Plaintiff is permitted to use a pseudonym at trial. (Opp. at 10-11); *see also Advanced Textile*, 214 F.3d at 1072 (cautioning that courts must evaluate the precise prejudice plaintiffs' pseudonymity would cause defendants at each stage of the litigation); *John Doe 140 v. Archdiocese of Portland in Oregon*, 249 F.R.D. 358, 361 (D. Or. 2008) (holding that "defendants should retain the right to refile their request later in this action, as [Plaintiff's] claims [*7] approach trial.").

The weight of authority on this issue supports Defendant Rose's position. Many courts have expressed the concern that allowing a plaintiff to proceed under a pseudonym at trial would communicate "a subliminal comment on the harm the alleged encounter with the defendant has caused the plaintiff." *Doe v. Cabrera*, 307 F.R.D. 1, 10 (D.D.C. 2014) (citing *E.E.O.C. v. Spoa, LLC*, No. CIV. CCB-13-1615, 2013 U.S. Dist. LEXIS 148145, 2013 WL 5634337, at *3 (D. Md. Oct. 15, 2013), for the proposition that "the court's limited grant of anonymity would implicitly influence the jury should this case advance to trial"); *see also Doe No. 2 v. Kolko*, 242 F.R.D. 193, 198 (E.D.N.Y. 2006) (holding that the leave to proceed pseudonymously "only appl[ies] to the discovery period and may be reconsidered if this case goes to trial"). The effect of this "subliminal" suggestion — indeed, it is perhaps more accurately characterized as an overt suggestion, repeated each time Plaintiff is referred to as "Jane Doe" — is likely to be strong enough that a limiting instruction would not sufficiently eliminate the resulting prejudice to Defendant Rose. *See Cabrera*, 307 F.R.D. at 10 n.15.

At the hearing, Plaintiff renewed her contention that that any prejudice to Defendant could be resolved by revealing Plaintiff's name only to the jury and otherwise restricting the media's ability to [*8] publish her name and image. (*See* Opp. at 7). Closing the courtroom would likewise send the same prejudicial message to the jury that would be sent by use of the pseudonym. And closing the courtroom is the only practical way of revealing

Plaintiff's name to the jury alone. Closing the trial would raise First Amendment concerns that have not adequately been briefed. The Court is not willing to violate the First Amendment, or even skirt its edges.

C. The Public's Interest in Disclosure

Previously, the Court found that the public has a strong interest "in encouraging victims of sexual assault to bring claims against their assailants." (June Order at 5) (citing *Advanced Textile*, 214 F.3d at 1073 (9th Cir. 2000); *Kolko*, 242 F.R.D. at 195 (E.D.N.Y. 2006) ("The public generally has a strong interest in protecting the identities of sexual assault victims so that other victims will not be deterred from reporting such crimes.")). However, as trial approaches, the public's interest in disclosure also increases. *See, e.g., Courthouse News Serv. v. Planet*, 750 F.3d 776, 786 (9th Cir. 2014) ("It is . . . well-established that the right of access to public . . . proceedings is 'necessary to the enjoyment' of the right to free speech." (quoting *Globe Newspaper Co. v. Superior Court for Norfolk Cty.*, 457 U.S. 596, 604, 102 S. Ct. 2613, 73 L. Ed. 2d 248 (1982))); *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 599, 100 S. Ct. 2814, 65 L. Ed. 2d 973 (1980) ("[T]he First and Fourteenth Amendments clearly give the press and the public a right of access to trials themselves, civil as well as criminal." (Stewart, J., concurring)). Therefore, [*9] while not discounting the public's strong interest in encouraging victims of sexual assault to pursue their rights in court, the Court finds that, for purposes of the trial itself, the balance of the public interest has shifted to favor public access and disclosure.

In sum, although Plaintiff's need for a pseudonym has not vanished, the prejudice to Defendant Rose and the public's interest in disclosure together weigh against allowing Plaintiff to proceed under a pseudonym at trial.

D. Defendants Hampton and Allen's Motion to Strike

Defendants Hampton and Allen move to strike certain allegations made by Plaintiff's counsel in support of Plaintiff's Opposition to Defendant Rose's Motion. (Mot. to Strike at 1). Because the Court grants Defendant Rose's motion and was not influenced by the disputed material, Defendants Hampton and Allen's motion is moot. The Motion to Strike places on the docket counsel's vociferous denial of the allegations in Plaintiff's Opposition.

III. CONCLUSION

For the foregoing reasons, Defendant Rose's Motion is **GRANTED**. Plaintiff will be precluded from using a pseudonym at trial. The parties will continue to use the pseudonym until the jury panel is called. Defendants [*10] Hampton and Allen's Motion is **DENIED as moot**.

IT IS SO ORDERED.

End of Document

STATUTORY APPENDIX

Relevant Statutory Provisions and Rules

CrR 3.5 provides:

(a) Requirement for and Time of Hearing. When a statement of the accused is to be offered in evidence, the judge at the time of the omnibus hearing shall hold or set the time for a hearing, if not previously held, for the purpose of determining whether the statement is admissible. A court reporter or a court approved electronic recording device shall record the evidence adduced at this hearing.

(b) Duty of Court To Inform Defendant. It shall be the duty of the court to inform the defendant that: (1) he may, but need not, testify at the hearing on the circumstances surrounding the statement; (2) if he does testify at the hearing, he will be subject to cross examination with respect to the circumstances surrounding the statement and with respect to his credibility; (3) if he does testify at the hearing, he does not by so testifying waive his right to remain silent during the trial; and (4) if he does testify at the hearing, neither this fact nor his testimony at the hearing shall be mentioned to the jury unless he testifies concerning the statement at trial.

(c) Duty of Court To Make a Record. After the hearing, the court shall set forth in writing: (1) the undisputed facts; (2) the disputed facts; (3) conclusions as to the disputed facts; and (4) conclusion as to whether the statement is admissible and the reasons therefor.

(d) Rights of Defendant When Statement Is Ruled Admissible. If the court rules that the statement is admissible, and it is offered in evidence: (1) the defense may offer evidence or cross-examine the witnesses, with respect to the statement without waiving an objection to the admissibility of the statement; (2) unless the defendant testifies at the trial concerning the statement, no reference shall be made to the

fact, if it be so, that the defendant testified at the preliminary hearing on the admissibility of the confession; (3) if the defendant becomes a witness on this issue, he shall be subject to cross examination to the same extent as would any other witness; and, (4) if the defense raises the issue of voluntariness under subsection (1) above, the jury shall be instructed that they may give such weight and credibility to the confession in view of the surrounding circumstances, as they see fit.

CrR 4.3 provides in part:

(a) Joinder of Offenses. Two or more offenses may be joined in one charging document, with each offense stated in a separate count, when the offenses, whether felonies or misdemeanors or both:

(1) Are of the same or similar character, even if not part of a single scheme or plan; or

(2) Are based on the same conduct or on a series of acts connected together or constituting parts of a single scheme or plan. . . .

. . .

(e) Improper Joinder. Improper joinder of offenses or defendants shall not preclude subsequent prosecution on the same charge for the charge or defendant improperly joined

CrR 4.3.1 provides;

(a) Consolidation Generally. Offenses or defendants properly joined under rule 4.3 shall be consolidated for trial unless the court orders severance pursuant to rule 4.4.

(b) Failure to Join Related Offenses. (1) Two or more offenses are related offenses, for purposes of this rule, if they

are within the jurisdiction and venue of the same court and are based on the same conduct.

(2) When a defendant has been charged with two or more related offenses, the timely motion to consolidate them for trial should be granted unless the court determines that because the prosecuting attorney does not have sufficient evidence to warrant trying some of the offenses at that time, or for some other reason, the ends of justice would be defeated if the motion were granted. A defendant's failure to so move constitutes a waiver of any right of consolidation as to related offenses with which the defendant knew he or she was charged.

(3) A defendant who has been tried for one offense may thereafter move to dismiss a charge for a related offense, unless a motion for consolidation of these offenses was previously denied or the right of consolidation was waived as provided in this rule. The motion to dismiss must be made prior to the second trial, and shall be granted unless the court determines that because the prosecuting attorney was unaware of the facts constituting the related offense or did not have sufficient evidence to warrant trying this offense at the time of the first trial, or for some other reason, the ends of justice would be defeated if the motion were granted.

(4) Entry of a plea of guilty to one offense does not bar the subsequent prosecution of a related offense unless the plea of guilty was entered on the basis of a plea agreement in which the prosecuting attorney agreed to seek or not to oppose dismissal of other related charges or not to prosecute other potential related charges.

(c) Authority of Court To Act on Own Motion. The court may order consolidation for trial of two or more indictments or informations if the offenses or defendants could have been joined in a single charging document under rule 4.3.

CrR 5.1 provides;

(a) Where Commenced. All actions shall be commenced:

(1) In the county where the offense was committed;

(2) In any county wherein an element of the offense was committed or occurred.

(b) Two or More Counties. When there is reasonable doubt whether an offense has been committed in one of two or more counties, the action may be commenced in any such county.

(c) Right To Change. When a case is filed pursuant to section (b) of this rule, the defendant shall have the right to change venue to any other county in which the offense may have been committed. Any objection to venue must be made as soon after the initial pleading is filed as the defendant has knowledge upon which to make it.

CrR 5.2 provides:

(a) When Ordered--Improper County. The court shall order a change of venue upon motion and showing that the action has not been prosecuted in the proper county.

(b) When Ordered--On Motion of Party. The court may order a change of venue to any county in the state:

(1) Upon written agreement of the prosecuting attorney and the defendant;

(2) Upon motion of the defendant, supported by affidavit that he believes he cannot receive a fair trial in the county where the action is pending.

(c) Discharge of Jury. When the court orders a change of venue it shall discharge the jury, if any, without prejudice to the prosecution, and direct that all the papers and proceedings be certified to the superior court of the proper county and direct the defendant and the witnesses to appear at such court

ER 401 provides:

"Relevant evidence" means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.

ER 402 provides:

All relevant evidence is admissible, except as limited by constitutional requirements or as otherwise provided by statute, by these rules, or by other rules or regulations applicable in the courts of this state. Evidence which is not relevant is not admissible.

ER 403 provides:

Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

ER 701 provides;

If the witness is not testifying as an expert, the witness' testimony in the form of opinions or inferences is limited to those opinions or inferences which are (a) rationally based on the perception of the witness, (b) helpful to a clear understanding of the witness' testimony or the determination

of a fact in issue, and (c) not based on scientific, technical, or other specialized knowledge within the scope of rule 702.

GR 15 – attached separately

General Order 2011-1 (Div. II) provides:

IN RE THE USE OF INITIALS OR PSEUDONYMS
FOR CHILD WITNESSES IN SEX CRIME CASES

In light of the increased availability of court documents through electronic sources, the Court concludes that additional steps are required to protect the privacy interests of child witnesses in sex crime cases. Accordingly, it is hereby

ORDERED that in all opinions, orders and rulings in sex crime cases, this Court shall use initials or pseudonyms in place of the names of all witnesses known to have been under the age of 18 at the time of any event in the case. It is further

ORDERED that in all pleadings, motions and briefs filed with this Court in sex crime cases, all parties shall use initials or pseudonyms in place of the names of all witnesses known to have been under the age of 18 at the time of any event in the case.

Laws of 1992, ch. 188, § 9 provided:

Child victims of sexual assault who are under the age of eighteen, have a right not to have disclosed to the public or press at any court proceeding involved in the prosecution of the sexual assault, the child victim's name, address, location, photographs, and in cases in which the child victim is a relative or stepchild of the alleged perpetrator, identification of the relationship between the child and the alleged perpetrator. The court shall ensure that information identifying the child victim is not disclosed to the press or the

public and that in the event of any improper disclosure the court shall make all necessary orders to restrict further dissemination of identifying information improperly obtained. Court proceedings include but are not limited to pretrial hearings, trial, sentencing, and appellate proceedings. The court shall also order that any portion of any court records, transcripts, or recordings of court proceedings that contain information identifying the child victim shall be sealed and not open to public inspection unless those identifying portions are deleted from the documents or tapes.

RAP 2.5(a) provides in part:

Errors Raised for First Time on Review. The appellate court may refuse to review any claim of error which was not raised in the trial court. However, a party may raise the following claimed errors for the first time in the appellate court: (1) lack of trial court jurisdiction, (2) failure to establish facts upon which relief can be granted, and (3) manifest error affecting a constitutional right. . . .

RCW 9.94A.507 provides in part:

(1) An offender who is not a persistent offender shall be sentenced under this section if the offender:

(a) Is convicted of:

(i) Rape in the first degree, rape in the second degree, rape of a child in the first degree, child molestation in the first degree, rape of a child in the second degree, or indecent liberties by forcible compulsion;

(ii) Any of the following offenses with a finding of sexual motivation: Murder in the first degree, murder in the second degree, homicide by abuse, kidnapping in the first degree, kidnapping in the second degree, assault in the first degree, assault in the second degree, assault of a child in the

first degree, assault of a child in the second degree, or burglary in the first degree; or

(iii) An attempt to commit any crime listed in this subsection (1)(a); or

(b) Has a prior conviction for an offense listed in RCW 9.94A.030(31)(b), and is convicted of any sex offense other than failure to register.

RCW 9.94A.701(9) provides:

The term of community custody specified by this section shall be reduced by the court whenever an offender's standard range term of confinement in combination with the term of community custody exceeds the statutory maximum for the crime as provided in RCW 9A.20.021.

RCW 9A.20.021 provides in part:

(1) Felony. Unless a different maximum sentence for a classified felony is specifically established by a statute of this state, no person convicted of a classified felony shall be punished by confinement or fine exceeding the following: . .

.

...

(c) For a class C felony, by confinement in a state correctional institution for five years, or by a fine in an amount fixed by the court of ten thousand dollars, or by both such confinement and fine.

RCW 9A.44.010 provides in part:

(2) "Sexual contact" means any touching of the sexual or other intimate parts of a person done for the purpose of gratifying sexual desire of either party or a third party.

RCW 9A.44.089 provides:

(1) A person is guilty of child molestation in the third degree when the person has, or knowingly causes another person under the age of eighteen to have, sexual contact with another who is at least fourteen years old but less than sixteen years old and not married to the perpetrator and the perpetrator is at least forty-eight months older than the victim.

(2) Child molestation in the third degree is a class C felony.

U.S. Const. amend. I provides:

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.

U.S. Const. amend. IV provides:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. Const. amend. V provides:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a

witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

U.S. Const. amend. VI provides:

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 obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

U.S. Const. amend. XIV, § 1 provides in part:

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; nor deny to any person within its jurisdiction the equal protection of the laws.

Wash. Code § 2293 (Remington and Ballinger) provided:

The route traversed by any railway car, coach, train or other public conveyance, and the water traversed by any boat shall be criminal districts; and the jurisdiction of all public offenses committed on any such railway car, coach, train, boat or other public conveyance, or at any station or depot upon such route, shall be in any county through which said car, coach, train, boat or other public conveyance may pass during the trip or voyage, or in which the trip or voyage may begin or terminate.

Wash. Const. art. I, § 3 provides:

No person shall be deprived of life, liberty, or property, without due process of law.

Wash. Const. art. I, § 9 provides:

No person shall be compelled in any criminal case to give evidence against himself, or be twice put in jeopardy for the same offense.

Wash. Const. art. I, § 10 provides:

Justice in all cases shall be administered openly, and without unnecessary delay.

Wash. Const. art. I, § 21 provides:

The right of trial by jury shall remain inviolate, but the legislature may provide for a jury of any number less than twelve in courts not of record, and for a verdict by nine or more jurors in civil cases in any court of record, and for waiving of the jury in civil cases where the consent of the parties interested is given thereto.

Wash. Const. art. I, § 22 (amend. 10) provides:

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 county in which the offense is charged to have been committed and the right to appeal in all cases: Provided, The route traversed by any railway coach, train or public conveyance, and the water traversed by any boat shall be

criminal districts; and the jurisdiction of all public offenses committed on any such railway car, coach, train, boat or other public conveyance, or at any station or depot upon such route, shall be in any county through which the said car, coach, train, boat or other public conveyance may pass during the trip or voyage, or in which the trip or voyage may begin or terminate. In no instance shall any accused person before final judgment be compelled to advance money or fees to secure the rights herein guaranteed.

Wash. Const. art. IV, § 16 provides:

Judges shall not charge juries with respect to matters of fact, nor comment thereon, but shall declare the law.

DESTRUCTION, SEALING, AND REDACTION OF COURT RECORDS

(a) Purpose and Scope of the Rule. This rule sets forth a uniform procedure for the destruction, sealing, and redaction of court records. This rule applies to all court records, regardless of the physical form of the court record, the method of recording the court record, or the method of storage of the court record.

(b) Definitions.

(1) “Court file” means the pleadings, orders, and other papers filed with the clerk of the court under a single or consolidated cause number(s).

(2) “Court record” is defined in GR 31(c)(4).

(3) *Destroy*. To destroy means to obliterate a court record or file in such a way as to make it permanently irretrievable. A motion or order to expunge shall be treated as a motion or order to destroy.

(4) *Seal*. To seal means to protect from examination by the public and unauthorized court personnel. A motion or order to delete, purge, remove, excise, erase, or redact shall be treated as a motion or order to seal.

(5) *Redact*. To redact means to protect from examination by the public and unauthorized court personnel a portion or portions of a specified court record.

(6) Restricted Personal Identifiers are defined in GR 22(b)(6).

(7) *Strike*. A motion or order to strike is not a motion or order to seal or destroy.

(8) *Vacate*. To vacate means to nullify or cancel.

(c) Sealing or Redacting Court Records.

(1) In a civil case, the court or any party may request a hearing to seal or redact the court records. In a criminal case or juvenile proceeding, the court, any party, or any interested person may request a hearing to seal or redact the court records. Reasonable notice of a hearing to seal must be given to all parties in the case. In a criminal case, reasonable notice of a hearing to seal or redact must also be given to the victim, if ascertainable, and the person or agency having probationary, custodial, community placement, or community supervision over the affected adult or juvenile. No such notice is required for motions to seal documents entered pursuant to CrR 3.1(f) or CrRLJ 3.1(f).

(2) After the hearing, the court may order the court files and records in the proceeding, or any part thereof, to be sealed or redacted if the court makes and enters written findings that the specific sealing or redaction is justified by identified compelling privacy or safety concerns that outweigh the public interest in access to the court record. Agreement of the parties alone does not constitute a sufficient basis for the sealing or redaction of court records. Sufficient privacy or safety concerns that may be weighed against the public interest include findings that:

(A) The sealing or redaction is permitted by statute; or

(B) The sealing or redaction furthers an order entered under CR 12(f) or a protective order entered under CR 26(c); or

(C) A conviction has been vacated; or

(D) The sealing or redaction furthers an order entered pursuant to RCW 4.24.611; or

(E) The redaction includes only restricted personal identifiers contained in the court record;
or

(F) Another identified compelling circumstance exists that requires the sealing or redaction.

(3) A court record shall not be sealed under this section when redaction will adequately resolve the issues before the court pursuant to subsection (2) above.

(4) *Sealing of Entire Court File.* When the clerk receives a court order to seal the entire court file, the clerk shall seal the court file and secure it from public access. All court records filed thereafter shall also be sealed unless otherwise ordered. The existence of a court file sealed in its entirety, unless protected by statute, is available for viewing by the public on court indices. The information on the court indices is limited to the case number, names of the parties, the notation “case sealed,” the case type and cause of action in civil cases and the cause of action or charge in criminal cases, except where the conviction in a criminal case has been vacated, section (d) shall apply. The order to seal and written findings supporting the order to seal shall also remain accessible to the public, unless protected by statute.

(5) *Sealing of Specified Court Records.* When the clerk receives a court order to seal specified court records the clerk shall:

(A) On the docket, preserve the docket code, document title, document or subdocument number and date of the original court records;

(B) Remove the specified court records, seal them, and return them to the file under seal or store separately. The clerk shall substitute a filler sheet for the removed sealed court record. If the court record ordered sealed exists in a microfilm, microfiche or other storage medium form other than paper, the clerk shall restrict access to the alternate storage medium so as to prevent unauthorized viewing of the sealed court record; and

(C) File the order to seal and the written findings supporting the order to seal. Both shall be accessible to the public.

(D) Before a court file is made available for examination, the clerk shall prevent access to the sealed court records.

(6) *Procedures for Redacted Court Records.* When a court record is redacted pursuant to a court order, the original court record shall be replaced in the public court file by the redacted copy. The redacted copy shall be provided by the moving party. The original unredacted court record shall be sealed following the procedures set forth in (c)(5).

(d) Procedures for Vacated Criminal Convictions. In cases where a criminal conviction has been vacated and an order to seal entered, the information in the public court indices shall be limited to the case number, case type with the notification “DV” if the case involved domestic violence, the adult or juvenile’s name, and the notation “vacated.”

(e) Grounds and Procedure for Requesting the Unsealing of Sealed Records.

(1) Sealed court records may be examined by the public only after the court records have been ordered unsealed pursuant to this section or after entry of a court order allowing access to a sealed court record.

(2) *Criminal Cases.* A sealed court record in a criminal case shall be ordered unsealed only

upon proof of compelling circumstances, unless otherwise provided by statute, and only upon motion and written notice to the persons entitled to notice under subsection (c)(1) of this rule except:

(A) If a new criminal charge is filed and the existence of the conviction contained in a sealed record is an element of the new offense, or would constitute a statutory sentencing enhancement, or provide the basis for an exceptional sentence, upon application of the prosecuting attorney the court shall nullify the sealing order in the prior sealed case(s).

(B) If a petition is filed alleging that a person is a sexually violent predator, upon application of the prosecuting attorney the court shall nullify the sealing order as to all prior criminal records of that individual.

(3) *Civil Cases.* A sealed court record in a civil case shall be ordered unsealed only upon stipulation of all parties or upon motion and written notice to all parties and proof that identified compelling circumstances for continued sealing no longer exist, or pursuant to RCW 4.24 or CR 26(j). If the person seeking access cannot locate a party to provide the notice required by this rule, after making a good faith reasonable effort to provide such notice as required by the Superior Court Rules, an affidavit may be filed with the court setting forth the efforts to locate the party and requesting waiver of the notice provision of this rule. The court may waive the notice requirement of this rule if the court finds that further good faith efforts to locate the party are not likely to be successful.

(4) *Juvenile Proceedings.* Inspection of a sealed juvenile court record is permitted only by order of the court upon motion made by the person who is the subject of the record, except as otherwise provided in RCW 13.50.010(8) and 13.50.050(23). Any adjudication of a juvenile offense or a crime subsequent to sealing has the effect of nullifying the sealing order, pursuant to RCW 13.50.050(16).

(f) Maintenance of Sealed Court Records. Sealed court records are subject to the provisions of RCW 36.23.065 and can be maintained in mediums other than paper.

(g) Use of Sealed Records on Appeal. A court record or any portion of it, sealed in the trial court shall be made available to the appellate court in the event of an appeal. Court records sealed in the trial court shall be sealed from public access in the appellate court subject to further order of the appellate court.

(h) Destruction of Court Records.

(1) The court shall not order the destruction of any court record unless expressly permitted by statute. The court shall enter written findings that cite the statutory authority for the destruction of the court record.

(2) In a civil case, the court or any party may request a hearing to destroy court records only if there is express statutory authority permitting the destruction of the court records. In a criminal case or juvenile proceeding, the court, any party, or any interested person may request a hearing to destroy the court records only if there is express statutory authority permitting the destruction of the court records. Reasonable notice of the hearing to destroy must be given to all parties in the case. In a criminal case, reasonable notice of the hearing must also be given to the victim, if ascertainable, and the person or agency having probationary, custodial, community placement, or community supervision over the affected adult or juvenile.

(3) When the clerk receives a court order to destroy the entire court file the clerk shall:

(A) Remove all references to the court records from any applicable information systems maintained for or by the clerk except for accounting records, the order to destroy, and the written

findings. The order to destroy and the supporting written findings shall be filed and available for viewing by the public.

(B) The accounting records shall be sealed.

(1) When the clerk receives a court order to destroy specified court records the clerk shall;

(A) On the automated docket, destroy any docket code information except any document or sub-document number previously assigned to the court record destroyed, and enter “Order Destroyed” for the docket entry;

(B) Destroy the appropriate court records, substituting, when applicable, a printed or other reference to the order to destroy, including the date, location, and document number of the order to destroy; and

(C) File the order to destroy and the written findings supporting the order to destroy. Both the order and the findings shall be publicly accessible.

(5) This subsection shall not prevent the routine destruction of court records pursuant to applicable preservation and retention schedules.

(i) Trial Exhibits. Notwithstanding any other provision of this rule, trial exhibits may be destroyed or returned to the parties if all parties so stipulate in writing and the court so orders.

(j) Effect on Other Statutes. Nothing in this rule is intended to restrict or to expand the authority of clerks under existing statutes, nor is anything in this rule intended to restrict or expand the authority of any public auditor, or the Commission on Judicial Conduct, in the exercise of duties conferred by statute.

[Adopted effective September 22, 1989; Amended effective September 1, 1995; June 4, 1997; June 16, 1998; September 1, 2000; October 1, 2002; July 1, 2006; April 28, 2015.]

CERTIFICATE OF SERVICE

I, Neil Fox, certify and declare as follows:

On March 20, 2020, I served a copy of the OPENING BRIEF OF APPELLANT on counsel for the Respondent by filing this brief through the Portal and thus a copy will be delivered electronically.

I am also serving a copy of this brief on the appellant, by having a copy deposited into the U.S. Mail in an envelope with proper first class postage affixed addressed to:

Jason D. Streiff
DOC # 417934
Coyote Ridge Corrections Center
PO Box 769
Connell, WA 99326

Due to issues about the coronavirus and my working from home, I may not actually mail the brief to Mr. Streiff until next week.

I certify or declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

Dated this 20th day of March 2020, at Seattle, Washington.

s/ Neil M. Fox

WSBA No. 15277

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WSBA No. 15277

LAW OFFICE OF NEIL FOX PLLC

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