

FILED

NOV 16 2011

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

No. 294293

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

STATE OF WASHINGTON,

Respondent,

v.

ROBERT RUSSELL TRAINOR,

Appellant,

**ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR BENTON COUNTY**

The Honorable Vic L. Vandershoor, Judge

OPENING BRIEF OF APPELLANT

**Cassandra Lopez de Arriaga
Attorney for Appellant,**

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A. ASSIGNMENTS OF ERROR

1. The defense attorney engaged in ineffective assistance of counsel by failing to supplement his omnibus motion so as to compel the prosecutor to provide full discovery, including the results of any scientific tests or medical tests or examinations and/or Brady Material, the regrettable result of which was that the prosecutor withheld information and/or documentation regarding the medical examination/rape kit analysis conducted upon A.S., a minor, the alleged victim named in Count 1.

2. The defense attorney engaged in ineffective assistance of counsel by failing to include within his omnibus motion a request for a Bill of Particulars or more specificity as to the dates and locations of the alleged offenses in order to determine if alibi defenses existed and/or to insure that the defendant would be protected against double jeopardy.

3. The defense attorney engaged in ineffective assistance of counsel by failing to include within his omnibus motion a request that the Court sever the various counts of the Complaint from each other and in particular to have Count 3 severed from the other counts on the grounds that the charges pertained to persons and/or time frames unrelated to each other and/or to the other alleged victims.

4. The defense attorney engaged in ineffective assistance of counsel by failing to file a motion seeking suppression of the Defendant's statements to the police and/or the video taken of the defendant's interview.

5. The defense attorney engaged in ineffective assistance of counsel by failing to

voice any objections to the testimony given by each of the alleged victims regarding allegations of conduct outside of the time periods set forth in the Complaint and/or alleged by the prosecution.

6. The defense attorney engaged in ineffective assistance of counsel by failing to voice any objections to the testimony given by Carol Harting and/or by conceding that she qualified and should be viewed as an expert witness

7. The defense attorney engaged in ineffective assistance of counsel by failing to identify pre-trial and thereby preserve an important witness (Joseph Lee) for use in rebuttal of E.W., a minor's, testimony.

8. The defense attorney engaged in ineffective assistance of counsel by failing to voice any objections to the testimony of both K.H., a minor, and/or Kimberly Henle on the grounds that their testimony did not constitute proper rebuttal, that it consisted of inadmissible hearsay and/or improper bolstering, and that it also lacked proper foundation.

9. The defense attorney engaged in ineffective assistance of counsel by failing to amend his written post trial motion and/or to make an oral request or application for a new trial based upon the prosecution's failure to reveal the existence and results of and/or to provide reports with regard to the medical examination/rape kit analysis conducted upon A.S., a minor, the alleged victim named in Count 1.

10. The prosecutor committed misconduct by failing to advise the defendant of and/or to provide the defendant with documentation relating to the medical examination/rape kit analysis conducted upon A.S., a minor, the alleged victim named in Count 1, and/or other Brady Material.

11. The prosecutor committed error with regard to the “rebuttal witnesses” she presented.

12. The prosecutor committed error with her closing remarks by inappropriately trying to appeal or appealing to passion and prejudice, by distorting the testimony, by making improper gestures, etc.

13. The trial judge committed error with his rulings which restricted the number of exhibits the defense could present.

14. The trial judge committed error with his rulings which restricted the number of character witnesses the defense could present.

15. The trial judge committed error with his ruling which restricted the number and content of witnesses the defense could present.

16. The trial judge committed error with his rulings which prevented the defense from calling Joseph Lee as a rebuttal witness.

17. The trial judge committed error with his rulings which denied the defense’s post trial motion to set aside the verdict and to grant a new trial.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Did the defense attorney engage ineffective assistance of counsel by failing to supplement his omnibus motion so as to compel the prosecutor to provide full discovery, including the results of any scientific tests or medical tests or examinations and/or Brady Material, the regrettable result of which was that the prosecutor withheld information and/or documentation relating to the medical examination/rape kit analysis conducted upon A.S., a minor, the alleged victim named in Count 1?

2. Did the defense attorney engage ineffective assistance of counsel by failing to

include within his omnibus motion a request for a Bill of Particulars or more specificity as to the dates and locations of the alleged offenses in order to determine if alibi defenses could be presented and/or to insure that the defendant would be protected against double jeopardy?

3. Did the defense attorney engage ineffective assistance of counsel by failing to include within his omnibus motion a request that the Court sever the various counts of the Complaint from each other and in particular to have Count 3 severed from the other counts on the grounds that those charges pertained to persons and/or time frames unrelated to each other and/or to the other alleged victims?

4. Did the defense attorney engage ineffective assistance of counsel when he failed to file a motion seeking suppression of the Defendant's statements to the police and/or the video taken of the defendant's interview?

5. Did the defense attorney engage ineffective assistance of counsel when he failed to voice any objections to the testimony given by each of the alleged victims regarding allegations of conduct outside of the time periods set forth in the Complaint and/or alleged by the prosecution?

6. Did the defense attorney engage ineffective assistance of counsel by failing to voice any objections to the testimony given by Carol Harting and/or by conceding that she qualified and could be viewed as an expert witness?

7. Did the defense attorney engage in ineffective assistance of counsel when he failed to identify pre-trial and thereby preserving a potentially important witness (Joseph Lee) for use in rebuttal of E.W., a minor's, testimony?

8. Did the defense attorney engage in ineffective assistance of counsel when he

failed to voice any objections to the testimony of both K.H., a minor and/or Kimberly Henle as not being proper rebuttal and which consisted of nothing more than inadmissible hearsay, improper bolstering, and which also lacked proper foundation?

9. Did the defense attorney engage in ineffective assistance of Counsel when he failed to amend his written pre-sentence motion and/or to make an oral application for a new trial based upon the prosecution's failure to reveal the existence and results of and/or to provide the report relating to the sexual examination/rape kit analysis conducted upon A.S., a minor, the alleged victim named in Count 1?

10. Did the prosecutor engage in misconduct by failing to advise the defendant of and/or to provide the defendant with documentation relating to the medical sexual examination/rape kit analysis conducted upon A.S., a minor, the alleged victim named in Count 1, and/or any other Brady Material?

11. Did the prosecutor engage in misconduct with regard to the "rebuttal witnesses" that were presented?

12. Did the prosecutor engage in misconduct in her closing remarks by inappropriately appealing or trying to appeal to passion and prejudice, by distorting the testimony, by making improper gestures, etc.?

13. Did the trial court commit error with its rulings which restricted the number of exhibits the defense could present?

14. Did the trial court commit error with its rulings which restricted the number of character witnesses the defense could present?

15. Did the trial court commit error with its rulings which restricted the number and content of witnesses the defense could present?

16. Did the trial court commit error with its rulings which prohibited the defense from calling Joseph Lee as a rebuttal witness?

17. Did the trial court commit error with its rulings which denied the defense post trial motion to set aside the verdict and to grant a new trial?

C. STATEMENT OF THE CASE

1. Procedural History

On or about January 20, 2010, the Benton County Prosecutor's Office charged Robert Russell Trainor with one count of Rape of a Child in the First Degree as committed against D.S., a minor, on or about and between 8/1/06 – 1/1/08; one count of Rape of a Child in the Second Degree as committed against A.S., a minor, on or about and between 5/30/09 – 12/31/09; one count of Rape of a Child in the Second Degree as committed against E.W., a minor, on or about and between 11/18/01 – 11/17/03; one count of Child Molestation in the First Degree as committed against C.S., a minor, on or about and between 8/1/06 – 6/1/08; and one count of Child Molestation in the Third Degree as committed against M.S., a minor, on or about and between 12/1/09 – 12/31/09. (See Trial Transcript, hereinafter referred to as TT, pages 121 – 124)

In connection with the matter, and as the record reflects, defense counsel prepared and timely filed an Omnibus Motion on or about January 29, 2010 requesting various forms of relief, including discovery of any reports of tests or physical or mental examinations, scientific tests, etc. pertaining to the case. Thereafter, Omnibus Hearings or proceedings were held on 2/25/10, 3/18/10, 4/8/10, 4/29/10, 5/6/10, 5/20/10, and 6/17/10. During the course of the various pre-trial proceedings, and apparently assuming that the prosecution would honor its obligations under Rule CrR.4.7 in terms of providing the

aforesaid required discovery, defense counsel did not make any additional applications for the same. Also, despite the complaint alleging that the criminal conduct for each alleged victim occurred over a relatively wide range of time, defense counsel did not include within the Omnibus Motion any requests for a bill of particulars or more specificity as to the dates and locations of the alleged conduct, nor did he request severance of any of the counts from each other and/or at a minimum ask that Count 3 be severed from the others in that it referred to a person and time period not related to any of the other charges or alleged victims, nor did defense counsel prepare and file any motions requesting suppression of statements given by the defendant to the police.

Trial was conducted before the Honorable Vic L. Vanderschool from 8/9/10 through 8/16/10 and the jury returned its verdict on 8/16/10 after about 8 hours of deliberation, convicting Mr. Trainor as charged. (Verdict Transcript) After trial, as the record reflects, defense counsel prepared and filed a Motion For Arrest of Judgment and A New Trial, pursuant to CrR 7.4 and CrR 7.5. As the record also reflects, the prosecution filed a Memorandum In Opposition to the Defense Motion. At time of sentencing, the Court denied the defense motion and it also imposed sentence within the standard range. (Sentence Transcript). Subsequently, a timely Notice of Appeal was filed preserving the defendant's right to appeal his conviction and sentence. This appeal is based on the full record, including defense counsel's Omnibus Motion; the transcripts of the trial, the return of the verdict, the sentence proceeding; the post trial motions filed by defense counsel and the prosecution's response; and defense counsel's more recent affidavit and the Restitution Estimate Form pertaining to a medical/sexual examination performed on A.S., a minor, on or about February 2, 2010.

2. Prosecution Witnesses

a. A.S., a minor, the alleged victim named in Count 2 (which charged Rape 2d Degree for conduct occurring between 5/30/09 – 12/31/09) was the first witness called. Her testimony (TT, pages 137 – 154) with no objections voiced by defense counsel, was that the defendant, her step grandfather, began to engage in inappropriate touching in the summer of 2006 when she was eight years old and he had her touch his genital area, and then the conduct occurred other times with him touching her private areas, to include repeated digital penetration. According to her, this would occur maybe once or twice a month during the summers when she was at his house by herself, leading up to August or September of 2009 (she couldn't or wouldn't remember which month) when she was at his house and he again engaged in digital penetration as well as performing oral sex on her. Up to that point, and an issue raised solely on direct examination, she testified that she had told no one about what had occurred because she was scared and she didn't want to be the cause of the family breaking up. However, again an issue raised solely on direct examination, it was after that event that she said that she told her friend, K.H, a minor, what was occurring and a few months later she told her sister, C.S, a minor,, via an IPOD message but then told her that nothing had really happened. And then in January of 2010, she wrote a note or letter for her mother to find which set forth some details of the supposed abuse, her mother then confronted her about it, and then the police were called and the investigation that led to the defendant's arrest followed.

On cross examination (TT pages 155 – 163), she admitted that she had a history of lying about things when she was upset and that she had joined an anti-Christian devil-type group, and that she told her mother at one point in the conversation that nothing had

really happened with the defendant. At no time during the cross examination did defense counsel ask any questions about the witness delaying or failing to tell her mother or others about what was supposedly occurring. Also, of major significance in terms of this appeal, and while the prosecutor made it a point to have her testify that she was receiving therapy for the alleged abuse there were no questions asked and there was no mention of her undergoing any type of medical/sexual examination or evaluation in connection with the allegations, including that of digital penetration.

b. C.S., a minor, the alleged victim named in Count 4, (which charged Child Molestation 1st Degree for conduct occurring between 8/1/06 – 6/1/08) was the second witness called, and her testimony (TT 167 – 184), again with no objections voiced by defense counsel, was basically a carbon copy of A.S, a minor's, testimony in that she stated that the defendant began inappropriately touching her when she was in the 6th grade, but never below the waist until the 7th grade, and that the above the waist situation was maybe three times with him just touching her breasts. And then in the 7th grade after November he once touched her vaginal area but without penetration. Again an issue raised solely by the prosecution, she said that she never told anyone about this because she was scared until the situation with A.S, a minor, arose and then she told her mom what the defendant had supposedly been doing with her. She also made mention of receiving an IPOD message from A.S, a minor, but then ignored it as a dream because she then could not find a message on her machine and A.S, a minor, told her she was probably dreaming because nothing had happened. Also, as with A.S, a minor, the prosecution made it a point to have her testify that she was receiving therapy but no mention was made about her undergoing any type of medical/sexual evaluation or

examination. On cross examination (TT, pages 185 – 189), she stated that she told no one about the IPOD situation, including the police, until after the arrest of the defendant even though she had been interviewed extensively.

c. D.S., a minor, the alleged victim named in Count 1, (which charged Rape 1st Degree for conduct occurring between 8/1/06 – 1/1/08) was the next witness called, and her testimony (TT, pages 189 – 198), again with no objections voiced by defense counsel, was basically and eerily similar to the others in that she stated that the defendant inappropriately touched her when she was 7 years old and it was after her grandmother (the defendant's wife) died in 2007, that it happened when she was at the defendant's house and was spending the night as she had done maybe 20-25 times before, but that this particular night (without specifying the day of the week or even the month) the defendant started rubbing her vaginal area and also engaged in digital penetration but she was able to stop it by rolling over. Again an issue raised solely by the prosecution, she said that she never told her mom or anyone else because she cared for the defendant and didn't want him to get in trouble, but she did tell her mom when the situation with A.S., a minor, came up. However, without specifying the time frame, and to clearly corroborate A.S., a minor's testimony, she also said that she told A.S, a minor, what had happened. Also, as with A.S, a minor, and C.S, a minor,, the prosecutor made it a point to have her testify that she was receiving therapy but no mention was made about her undergoing any type of medical or sexual examination or evaluation, despite the claim that digital penetration had occurred.

d. M.S., a minor, the alleged victim named in Count 5,(which charged Child

Molestation 3d Degree for conduct occurring between 12/1/09 – 12/31/09), and the step sister to A.S, a minor, C.S., a minor, and D.S., a minor , was the next witness called and her testimony (TT, pages 200 – 216), again with no objections voiced by defense counsel, was likewise similar to the others in that she stated that after moving into the Sanders' home with her father and sisters in approximately September of 2009, and getting to know her step sisters and also meeting the defendant, that he invited her to spend the night at his house on Tuesday, December 29th and Wednesday, December 30th, and she accepted, that they were sitting on the couch in the living room watching movies on TV on the Tuesday night, and that he suddenly reached over and started rubbing her stomach area which made her uncomfortable so she “scoted away” and nothing more happened (an incident that she never mentioned to the police or the defense investigator when interviewed.). But then, according to her testimony, on Thursday morning, December 31st, he came into her bedroom, woke her up, got into the bed with her, and then started rubbing her back, then her belly area, and then her chest area including her left breast, and then he stopped. She said he later acted like nothing had happened and, again an issue raised solely by the prosecutor, she never told anyone about what occurred, including her father, because she didn't know if they would believe her but she did tell her step mother and the school counselor once the situation with A.S, a minor, came up. Also, as with the others, the prosecution made it a point to have her testify that she was receiving therapy but no mention was made or nor were questions asked about her undergoing any type of medical or sexual examination or evaluation.

e. Jamie Smith, the mother to A.S, a minor, C.S, a minor, and Danielle, and the

step mother to M.S, a minor,, was the next witness called and she basically testified (TT, pages 224 – 248) about her mother marrying the defendant, the great times and close relationship she had with the defendant, the fact that absolutely nothing improper had ever occurred between the defendant and her, etc. She also made mention about a particular incident in September of 2006, a month after her mother had died, with no objections voiced by defense counsel, when she, the defendant, and her niece, E.W, a minor, (then 16) took a trip to Montana and she became suspicious of something possibly happening between the defendant and E.W, a minor, but then dismissed the thought because she was on medication, the defendant denied any wrongdoing and more importantly E.W, a minor, said that nothing improper was happening. She then gave testimony about going into A.S, a minor's, dresser to get her wallet, and finding a note about the defendant molesting her, confronting A.S, a minor, about it, A.S, a minor, denying that anything had happened and then saying it was true, calling the school to meet with the counselor, meeting with the counselor, M.S, a minor, and C.S, a minor, also coming into the room, the police being called, and her sending a message to E.W, a minor, asking if anything had happened to her. And later that E.W, a minor, came into town and she took E.W, a minor, to talk with the police. And later that the defendant was arrested and she had all of the girls go into therapy but no mention was made of any of the girls undergoing a medical or sexual examination. She also acknowledged that she never once had any clues or hints of anything improper occurring between the defendant and any of the children until she read the note from A.S, a minor,

f. Subsequently, the prosecution called as witnesses the following individuals:

- 1) Kayla Winkler, Jamie's sister, who simply said that she picked up Danielle from elementary school and drove her to the counselor's office. (TT, pages 285 – 289)
- 2) Ronnelle Gall, the counselor at the middle school, who testified about the meeting in her office on 1/12/10 with Jaime Smith and the girls, being shown a letter or note purportedly written by A.S, a minor,, and her calling the police in light of what was being alleged. (TT, pages 293 – 297)
- 3) Officer Athena Clark, a member of Richland Police Department, who testified that she was called by Ms. Gall, responded to her office and was shown a letter or note and saw Jaime Smith and 4 girls, and then called for a detective to arrive. (TT, pages 300 – 304)
- 4) Cpl Matthew Clark, a police detective with the Benton County Sheriff's Department, who testified that he became involved in the investigation of the allegations that were made, had conversations with Jaime Smith about what she knew, made arrangements to have the girls interviewed at Kid's Haven, a local agency that specializes in interviewing children possibly victimized by sexual abuse, being introduced to E.W., a minor, by Jaime Smith and interviewing her, and then later arresting the defendant and conducting an interview of him which was videotaped and recorded. (TT, pages 308 – 314) Then on cross examination (TT, pages 315 – 325), he testified about having a technique of interviewing and trying to get confessions from people but that the defendant never admitted doing anything wrong with the girls, and he also stated that a thorough search

was done of the defendant's home and that absolutely nothing was found or observed pertaining to pornographic material, pictures or magazines or videos showing children, or any other evidence supporting the allegations.

- 5) The prosecution then called Carol Harting, a licensed mental health counselor, who, without defense counsel voicing any objections, was declared to be an expert witness and although indicating that she was not personally involved with the allegations or children involved in this matter gave testimony in general terms about the concept of "grooming" in connection with sexual touching and/or other sexual contact and was further allowed to state various reasons why children may not tell others what is occurring. (TT, pages 330 – 346)
- 6) E.W., a minor, the alleged victim in Count 3 (which charged Rape 2d Degree for conduct occurring between 11/18/01 – 11/17/03) and without question the oldest alleged victim and the strongest witness for the prosecution, was then called to give her testimony (TT, pages 360 – 383), and she basically said, again without any objections voiced by defense counsel, that she resided in the Tri-Cities area from 2000 to 2005 (age 10 – 15) and had a very close relationship with her aunt, Donna, and her husband, the defendant, but that the relationship with the defendant changed in the summer of 2002 when one night while she was sleeping in the same bed with Donna and the defendant she awoke to the defendant's hands stroking her vaginal area and then engaging in digital penetration which caused her to get out of bed and go to sleep in the garage (although

when interviewed she told the police that she couldn't remember digital penetration occurring on that occasion). After that, according to the testimony, she slept in a separate bedroom but the defendant would come into the room in the mornings to have what he called "snuggle time" and he would rub and touch her breasts or her vaginal area, with some occasional penetration and sometimes he would have her touch his penis, and she indicated that these incidents were frequent, and almost any time she was at their house. As a result, she stated that she tried to avoid being at the house but then Donna got sick with cancer and she wanted to spend time with her so she would go to the house and then the same things would happen again. She then moved away to Seattle with her father and that resolved the situation at that time, but then she learned that Donna was about to die so she returned to the area to be with her. And after Donna died, according to the testimony, and although she had other places to stay, she remained at the house and that is when the defendant actually had "normal" intercourse with her and he also made her take his penis in her mouth. According to her testimony, she thereafter left the area and had no further contact with the defendant. Despite all of this occurring, again an issue raised solely by the prosecution, she testified that she never told or complained to anyone (including her mother who was a nurse, or her father, or even her brother) because she was afraid that no one would believe her and/or she feared that the defendant would hurt her, etc. (even though he had never threatened her in any fashion).

7) However, on cross examination (TT, pages 383 – 409), and contradicting the testimony about having no further contact and making efforts to avoid the she acknowledged going on other trips with the defendant and admitted that she sent photos to the defendant of her Junior Prom in April of 2007 and she also admitted that she placed phone calls to the defendant on a handful of occasions to just have small talk.

3. Defense Witnesses

Upon the prosecution resting its case, the defendant attempted to call several “character witnesses” to give testimony about the defendant having an exemplary reputation for sexual morality. At that point, however, the prosecution raised numerous objections with regard to the defense attorney’s intentions, a long legal argument arose concerning what was required for such testimony and the court directed that a voir dire examination of each intended witness outside the presence of the jury be conducted before testimony would be allowed. Thus, the defense was forced to call and examine each intended witness and obtain a ruling from the court prior to the jury hearing their testimony. In turn, the defense called and examined: Glen Carter (TT, pages 412 – 430) (who was ruled allowable and who thereafter gave testimony before the jury), Brett Knapp (TT, pages 433– 440)(who was ruled allowable and who thereafter gave testimony before the jury), Susan Meeks (TT, pages 441 – 447) (who was ruled as not allowable), Dan Haeberlin (TT, pages 447– 451) (who was ruled not allowable), Violet Greenough (TT, pages 451 – 453) (withdrawn by defense counsel based on the court’s earlier previous rulings), and Tina Nelson (TT, pages 454 – 460) (who was ruled not allowable). And the defense then attempted to call Joseph Lee, a person who defense counsel had

negligently failed to identify and preserve as a possible witness, in order to offer rebuttal testimony to that of E.W., a minor, but was denied by court ruling (TT, pages 501 – 508). And then the defense called the defendant, who basically provided a history as to family events and who denied any improper contact or conduct with any of the alleged victims (TT, pages 508 – 575).

4. Rebuttal Witnesses

a. Following the defense resting their case, the prosecution then called two persons, K.H., a minor, and Kimberly Henle, who they identified as rebuttal witnesses and they were allowed to give testimony without any objection from defense counsel, despite what the defendant herein submits was without proper foundation and despite their testimony consisting of inadmissible hearsay.

b. In terms of their accounts, K.H., a minor, testified (TT, pages 577 –579) that she was a friend of A.S., a minor, and that A.S, a minor, told her in October and again in December of 2009 that the defendant ‘was touching her and doing things to her’ and she told A.S, a minor, to take a couple of deep breaths and she would get through it. She also testified that she told her mother of what A.S, a minor, had said. Kimberly Henle, K.H, a minor’s, mother, was then called and she testified (TT, pages 580 – 582) that sometime after Thanksgiving of 2009, K.H, a minor, told her that abuse was going on regarding A.S., a minor,, that she wanted to tell A.S, a minor’s, mother but was asked not to, and that later she was told by K.H, a minor, that A.S, a minor’s, mother had been told.

5. Closing Arguments

a. Following the conclusion of the testimony, the Judge provided legal instructions

and then both counsel were allowed to give their respective closing arguments.

b. As for the prosecutions remarks (TT, pages 596 – 613), which the defense submits was a clear attempt to appeal to passion and prejudice and to inflame the jury, her theme was that the defendant was basically a monster who terrorized and tormented these girls on multiple occasions when he was supposed to be their guardian and mentor, and that these girls kept their secrets out of desperation and fear and that they needed saving for all of the abuse they suffered over the years. Reference was continually made to alleged incidents that were outside the scope of the specific time periods set forth in the complaint. The male jurors were asked to place themselves in the situation of whether they would hang out with teen girls, let alone be in bed with them. She also offered her opinion (and thereby tried to be a witness) about the defendant's interview with the police and how his gestures and appearance evoked guilt when no such testimony was presented by any witnesses. And on various occasions the prosecutor actually made statements that were contrary to the actual testimony and/or consisted of not much more than a demonstration of her emotions, to the point that the judge had to intervene and tell her to "try to make it a little less personal" (TT, p611) and "you might tone it down a little bit, the dramatics." (TT, p611)

6. Jury Deliberation

As the record reflects, the jury began their deliberations at basically the close of business on Friday, 8/12/10, and were therefore sent home within a half hour of getting the case. Deliberations resumed on Monday morning and after about 8 hours they returned their verdict, convicting the defendant on all of the charges.

7. Restitution Estimate Form/Charge of Costs

On the day of sentencing, defense counsel received from the prosecution a document entitled Restitution Estimate Form which basically was intended to assess to the defendant a restitution cost in the amount of \$539.99. (Affidavit of Defense Counsel dated September 19, 2011) As is evident, the document reflects that a medical or sexual assault examination conducted on A.S., a minor, by Dr. V. Gladson at the Lourdes Medical Center on 2/2/10. And as the defense submits, at no time prior to trial did the prosecutor ever advise the defense of the existence of this medical procedure or examination nor did they provide any reports concerning the same. And when defense counsel brought this to the prosecutor's attention, her shocking response was for him to disregard the invoice and not to worry about it being paid.

8. Motion For A New Trial

Prior to the sentencing date, defense counsel prepared and filed a Motion For Arrest of Judgment and A New Trial based upon the issues of ineffective assistance of counsel (acknowledging that at the very least it consisted of him making no motion or application to sever the counts and more specifically the count pertaining to E.W., a minor, and of him failing to object to the testimony of K.H, a minor, and Kimberly Henle), based also upon his contention that the court erred in not allowing a number of character witnesses he wanted to call for the defense, and based upon his contention that the prosecutor engaged in misconduct by making gestures and facial expressions before the jury, by her voicing personal opinions on aspects of the case, by making various misstatements about the testimony, and by her overall attempts to inflame the jury. Strangely, but perhaps not shocking in light of his overall less than effective conduct, defense counsel made no mention (either in writing or verbally) of the information he had just received concerning

the medical/sexual examination of A.S., a minor, (which we submit constitutes Brady Material). The prosecution prepared and filed an opposing Response and both sides submitted. The Court thereupon denied the Motion and proceeded to impose sentence. (Sentencing Transcript)

D. ARGUMENT

1. DEFENSE COUNSEL REGRETTABLY ENGAGED IN MULTIPLE INSTANCES OF INEFFECTIVE ASSISTANCE OF COUNSEL WHICH CUMULATIVELY RESULTED IN THE DEFENDANT NOT RECEIVING A FAIR TRIAL OR DUE PROCESS OF LAW.

As the court well knows, for a defendant to show ineffective assistance of counsel, and thereby have a conviction set aside or overturned for this reason, it must be demonstrated that counsel's performance was defective and that the deficient performance prejudiced him or deprived him of a fair trial and a verdict based only on legally proper and admissible evidence. *State v. MacFarland*, 127 Wn.2d 322, 899 P.2d 1251 (1995) Also, stated somewhat differently, deficient performance occurs when counsel's performance falls below an objective standard of reasonableness, with the reasonableness viewed in light of all the circumstances and the facts of the particular case. *State v. Stenson*, 132 Wn.2d 668, 940 P.2d 1239 (1997); *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052 (1984). And prejudice occurs when but for the deficient performance the outcome would have been different. *In re Personal Restraint Petition of Pirtle*, 136 Wn.2d 467, 965 P.2d 593 (1998)

In terms of this issue, the defendant concedes that judicial deference is generally given to counsel's performance and therefore any analysis begins with a presumption that counsel provided proper and effective representation. *State v. MacFarland*, supra. Further, if defense counsel's conduct can be characterized as legitimate trial strategy or tactics, then it cannot serve as a basis for a claim of ineffective assistance of counsel, and ineffective assistance of counsel does not occur when counsel refuses to pursue strategies that reasonably appear unlikely to succeed. *State v. Adams*, 91 Wn.2d 86, 586 P2d 1168 (1978); also *State v. MacFarland*

All of that being said, there can be no question that in its totality defense counsel's conduct fell below the standard of reasonableness necessary in this particular case and for this defendant to receive a fair trial, that prejudice to this defendant most certainly occurred, and but for defense counsel's inappropriate conduct the results would have been different.

a. First, ostensibly relying on Rule CrR 4.7a, and assuming that the prosecutor would honor her obligations and provide all information and/or documentation dealing with physical, medical or mental examinations, etc., defense counsel did not prepare or file, as was his entitlement under Rule CrR 4.7e, and as a backup measure, a separate supplemental motion asking for such information or documentation and/or anything that could be considered Brady Material or evidence potentially favorable to the defense. As it turns out, this became very critical in this case. That is, as the record reflects, while the prosecutor made it a point to ask each alleged victim whether they were receiving therapy, not one witness was asked if she had received any form of medical or sexual examination. But the prosecutor certainly was aware that A.S., a minor, had in fact

undergone a medical or sexual examination as of February 2, 2010 (which would have been consistent with her claim of digital penetration), and they failed to provide such information or documentation to the defense. While the defendant will argue this point more fully herein with respect to our claim of prosecution misconduct, it is respectfully submitted that defense counsel erred as well in not preparing and filing a supplemental motion.

b. Second, as the record reflects, the formal charges against the defendant were that he committed Count 1 (1 single instance of digital penetration against D.S., a minor,) between 8/1/06 – 1/1/08, Count 2 (1 single instance of engaging in oral sex against A.S., a minor,) between 5/31/09 – 12/31/09, Count 3 (1 single instance of digital penetration against E.W., a minor,) between 11/18/01 11/17/03, Count 4 (1 instance of rubbing the breast area of C.S., a minor,) between 8/1/06 – 6/1/08, and Count 5 (1 instance of cupping the breast area of M.S., a minor,) between 12/1/09 – 12/31/09. However, with these wide ranges of dates, there was no way that the defendant could determine if he was elsewhere at the time of the alleged singular offenses and thereby had an alibi for it and there was no way that the defendant could be protected against another prosecution if the jury returned a verdict in his favor and therefore not face a situation of double jeopardy unless the dates were narrowed and that required defense counsel to seek more specificity. To protect the defendant's rights, defense counsel needed to do that, either by separate application or within the Omnibus Motion he filed, but he failed to do so and not doing so fell below a standard of reasonableness and amounted to ineffective assistance of counsel.

c. Third, noting the multiplicity of alleged victims, the acts of misconduct attributed

to the defendant, and the wide ranges of dates allegedly involved, there is no question that defense counsel should have filed a motion to sever the various counts of the Complaint from each other and/or to at least sever Count 3 from the others (which could have been done with either a separate application or within the Omnibus Motion he filed). As the court is well aware, Rule 4.3 indicates that two or more offenses can be joined in one charging document when the offenses are either of the same or similar character even if not part of a single scheme or plan ,or are based on the same conduct or on a series of acts connected together or are parts of a single scheme or plan. Even so, Rule 4.4 gives a defense counsel the authority to file a motion requesting severance on the basis that such is needed to promote a fair determination of the defendant's guilt or innocence of each offense. Further, as the courts have held, and consistent therewith, severance of charges is important when there is a risk that the jury will use the evidence of one crime to infer guilt for another crime or to infer criminal disposition. *State v. Russell*, 125 Wn.2d 24, 882 P.2d 747 (1994) (citing *State v. Watkins*, 53 Wn.App 264, 766 P.2d 484 (1989)) And the joinder of charges can be particularly prejudicial when the alleged crimes are sexual in nature. *State v. Saltarelli*, 98 Wn.2d 358, 655 P.2d 697 (1982). And this is true even if the jury is properly instructed to consider the crimes separately. (*State v. Harris*, 36 Wn.App 746, 677 P.2d 202 (1984). And the failure to seek severance of counts has been held to constitute ineffective assistance of counsel in and of itself. *State v. Sutherby*, 165 Wn.2d 870, 204 P.3d 916 (2009)

The prosecution's argument on this issue will undoubtedly be that the defendant must show, which he cannot do, that the court would have granted severance and that there is a reasonable possibility that the result would have been different in separate

trials. *State v. Warren*, 55 Wn.App 645, 770 P.2d 1159 (1989) The prosecution will also probably argue, pursuant to *State v. Eastabrook*, 58 Wn.App 805, 795 P.2d 151, 803 P2d 325 (1990), that the central factors to be considered on this issue include the strength of the State's evidence on each count and the admissibility of other crimes whether or not charged or joined, and that these factors are favorable to the prosecution in this matter. The problem, however, is that any such argument is without merit.

As noted above, Counts 1, 2, 4 and 5 were certainly similar in nature and they pertained to members of the same household so a possible argument could potentially be made that there was some relationship between them. However, it seems likely that the court would have been compelled to grant a severance because the alleged single offenses for each count ranged from 8/1/06 – 1/1/08, to 5/31/09 – 12/31/09, back to 8/1/06 – 6/1/08 and then to 12/1/09 – 12/31/09, respectively and there was no claim, let alone evidence, of a single scheme or plan. Rather, whether or not those words were used, the prosecutor was clearly and improperly advancing a claim of sexual disposition on the defendant's part. The only solution to avoid the same was severance but defense counsel never moved for it. Also, any claim that the prosecution's case was strong without the counts being joined is equally without merit. Each count depended on the credibility of young girls who had failed to report the alleged offenses for months and even years, and therefore bootstrapping the offenses was needed to strengthen or support otherwise weak evidence. Further, aside from what the girls claimed, there was absolutely nothing of an independent nature (such as a confession) or any medical or sexual examination evidence to establish that an act or a crime even occurred. Indeed, it seems apparent that the medical examination of A.S, a minor, Sanders resulted in exculpatory or favorable

evidence belying her claim of digital penetration which is why the prosecution withheld the same from the defendant.

And the argument for severance was even more substantial as to Count 3 which pertained to E.W., a minor,. Given her and maturity, and her ability to sort of carry the lead, it is clear why the prosecution wanted her joined with the others. However, while she may have lived in the same town and had some family kinship to the other girls, she was never part of the Sanders family nor did she actually associate with the other much younger girls. Also, the time period of her alleged offense was 11/18/01 – 11/17/03, some three years earlier than either Count 1 or Count 4 and six years earlier than Counts 2 and 5. Under these various circumstances, severance was a necessity but counsel never asked for it and his failure to do so constituted ineffective assistance of counsel.

d. Fourth, pursuant to Rule CrR 3.5 and CrR 3.6, counsel had an absolute right and indeed an obligation to seek suppression of the defendant's statements to the police. Without question, he was the subject of a criminal investigation, he was in custody at police headquarters, and he was being asked questions for the purpose of the police eliciting incriminating statements from him. Also, as was indicated in his testimony (TT, pages 308 – 329), Corporal Matt Clark had a unique method of interrogation that made inexperienced subjects (such as the defendant) not only uncomfortable (and exhibit the same) but also amenable to confessing to criminal activity. And although the defendant did not make any such statements, his discomfort showed itself and that was commented on by the prosecutor during her closing remarks (a fact that will be further discussed herein). Arguably, and in light of the defendant being advised of his rights and the other

relevant circumstances involved, such a motion might have been denied but it was counsel's duty to at least make the application.

e. Fifth, it is absolutely incredible and without any explanation, reasonable or otherwise, that defense counsel voiced no objections with respect to the testimony of the various alleged victims regarding alleged acts or conduct that were clearly outside of the time periods set forth in the accusing document. As has been indicated, and despite the prosecution claiming that the defendant committed the crimes charged by engaging in single instances of improper conduct between 8/1/06 – 1/1/08 (as to Count 1), 5/20/09 – 12/31/09 (as to Count 2), 11/18/01 – 11/17/03 (as to Count 3), 8/1/06 – 6/1/08 (as to Count 4), and 12/1/09 -12/31/09 (as to Count 5), she continually asked questions and elicited testimony from each girl that the defendant engaged in multiple and/or repeated and/or forcible acts of sexual misconduct with her over a time period that exceeded the stated time periods without any limiting motions or objections from the defense. The jury was therefore presented with a picture that the defendant was a habitual pedophile that had a disposition to engage sexual conduct with young girls.

As the court is well aware, evidence of a defendant's prior misconduct or misconduct other than the crimes actually charged is normally inadmissible because it could improperly result in the jury believing that an accused person has the propensity to commit the crimes charged. *State v. Holmes*, 43 Wn.App 397, 717 P.2d 766 (1986) *State v. Lough*, 125 Wn.2d 847, 889 P.2d 487 (1995) *State v. Fisher*, No. 79801-0 (2010) To insure that such does not occur, Rules 4.3 and 4.4 allow a defendant to challenge either the joinder of offenses or the offering of such evidence and thereupon

requires the trial court to exercise its discretion to exclude otherwise potentially relevant evidence that would be unfairly prejudicial.

And prior to allowing such misconduct evidence, the court must find determine if by a preponderance of the evidence that: 1) the misconduct actually occurred; 2) the purpose for allowing such evidence; 3) the relevance of such evidence to prove an element of the crime; and 4) then weigh the probative value against the prejudicial effect of the evidence. *State v. Fisher*; *State v. Tharp*, 96 Wn.2d 591, 637 P.2d 961 (1981); *State v. Salterelli*, 98 Wn.2d 358, 655 P.2d 697 (1982); *State v. Dennison* 115 Wn.2d 609, 801 P.2d 193 (1990); *State v. Smith*, 106 Wn.2d 772, 725 P.2d 951 (1986) And because substantial prejudicial effect is inherent in such evidence, uncharged offenses should only be admissible if they have substantial probative value. *State v. Lough*; *State v. Foxhoven*, 161 Wn.2d 168, 163 P.3d 786 (2007) And if there is doubt, it should be resolved in favor of the defendant. *State v. Smith*. Here, however, the court made no such findings because defense counsel never made any requests for the court to do so either with pre-trial motions or objections or applications during the trial itself. As a result, the prosecutor was able to present, as she said in her closing, and the jury was able to “hear about a lot of sexual contact in this case” (TT, p599) and “about the entire sexual contact that the defendant had with each of the victims in the case.” (TT, p599)

Also, it is acknowledged that the State may offer evidence of prior or other misconduct to rebut an assertion by the defendant or when the defendant opens the door to a particular subject. *State v. Ciskie*, 110 Wn2d 263, 751 P2d 1165 (1988); *State v. Gefeller*, 76 Wn2d 449, 458 P2d 17 (1969) Here, however, the defense opened no such doors and there was no legitimate purpose for such extraneous evidence to be presented

or allowed. In that regard, it must be remembered that defense counsel never asked any of the alleged victims or raised as an issue as to why they delayed in reporting any of the alleged events; rather it was the prosecutor who did so. Additionally, there was no relevance of the extraneous misconduct to proving any elements of the crimes charged, and without question the prejudicial effect of the extraneous evidence was overwhelming and far outweighed the probative value. In summary, there is little question that the extraneous misconduct would have been ruled as inadmissible if defense counsel had simply filed an appropriate motion or at least made objections or applications during the trial. His failure to do so cannot be excused and most certainly constitutes ineffective assistance of counsel.

f. Sixth, defense counsel committed further error when he failed to voice any objections to the testimony of Carol Harting and then conceded that she qualified as and could be viewed as an expert witness. As the record reflects, Ms. Harting was supposedly called by the prosecution to offer expert opinions and to answer why, as the prosecutor phrased it in her opening, these girls didn't tell anybody when the supposed abuse occurred and why children who are sexually abused act the way they do. Here, however, as noted above, the defense did not raise as an issue the delay between any supposed sexual abuse and any of the girls reporting the same. Rather, it was the prosecution that voiced the issue and then tried to provide an answer. Similarly, the defense did not make any critical remarks about why the girls "acted" the way they did; rather, it was the prosecutor who again voiced the issue and then tried to provide an answer. Further, Ms. Harting's background and history (working at Child Protective for only a "short time" and testifying 2 or 3 times as an expert with regard to victims of

sexual abuse (over 10 years earlier but not involving children) did not reach the level of qualifying her as an expert in the area of child sexual abuse. Additionally, Ms. Harting indicated that she never contacted any of the alleged victims personally and therefore had no direct knowledge of their particular circumstances in connection with these allegations. In essence, she was allowed to offer testimony in extremely generalized terms regarding children experiencing such things as fear, denial, minimization, shock, disassociation, etc. without having any direct knowledge of the alleged victims here and without being able to say that the alleged victims here had a basis for or underwent those circumstances. The testimony was therefore irrelevant, improper and not admissible and it was error for defense counsel to voice no objections.

g. Seventh, knowing in advance that the prosecution intended to call E.W., a minor, as a witness to support the allegations contained in Count 3 (and that part of her testimony was that she left town and then made every effort to and had absolutely no further contact with the defendant because of what he had supposedly done to her) and despite having both documentation and information that a witness, Joseph Lee, could rebut such testimony and in fact establish that Ms. Williams continued to engage meetings and/or other conduct with the defendant, defense counsel either forgot that Mr. Lee existed or he simply failed to identify Mr. Lee to the prosecution or the jury and he then allowed Mr. Lee to sit in the audience during the trial, including the testimony of Ms. Williams. When he then realized what had happened, he made application to have the court allow Mr. Lee to testify, the prosecution opposed, and the court denied the request, stating that “given the whole situation, it’s not appropriate to allow him to testify.” (TT, p 504) Again, defense counsel therefore engaged in conduct constituting

ineffective assistance of counsel which impacted unfavorably on the defendant. In essence, it was bad enough that he made no applications to sever Count 3 from the trial but in this instance he also was the cause of evidence contradictory to that witness not being received.

h. Eighth, defense counsel committed further error when he failed to object or to voice any opposition to the testimony of either or both K.H., a minor, and/or Kimberly Henle. As the record reflects, both individuals were presented by the prosecution as rebuttal witnesses without even a remote hint of objection or a request for an offer of proof from defense counsel. In terms of her testimony, again without any objections being raised, K.H., a minor, was asked questions about having conversations with A.S., a minor, in October and December of 2009 and she indicated that A.S, a minor, supposedly told her that the defendant had been touching her and that she (K.H, a minor,) had told her mother what A.S, a minor, said. The prosecution then called Kimberly Henle to the stand and her testimony, again without any objections being raised, was that her daughter, K.H, a minor,, had a conversation with her after Thanksgiving of 2009 and therein told her that A.S, a minor, told her that “there was abuse going on.” Clearly, this testimony was offered to bolster or support the testimony given by A.S., a minor, and it was certainly damaging to the defendant, but it also constituted what would normally be considered improper and inadmissible hearsay and therefore defense counsel should have objected to it being allowed, an objection that should have and in all likelihood would have been sustained. It was therefore error for defense counsel to not voice any objections.

As for any arguments from the prosecution that the testimony was proper rebuttal to the defendant generally claiming innocence and/or to offset any claims that A.S., a minor, failed to timely notify anyone of the alleged abuses, they are without merit. First, when a defendant insists that he did not engage the alleged misconduct but cannot offer an alibi defense (in this case because no exact date and time were provided), all he can say is that he did not do the conduct. Such a general denial is not an exception to the hearsay rule and does not open any doors to allow otherwise inappropriate hearsay testimony into evidence. *State v. Mason*, 31 Wn.App 680, 644 P.2d 710 (1982)

As for the second potential argument, and similar to the situation in *State v. Fisher*, this was not a situation where the defense asked any questions or otherwise raised any such issues or opened the door to the same. In fact, it clearly appears that defense counsel made an effort to not make any such claims. Rather, it was the prosecutor who raised the issue and then used the issue she raised to elicit testimony that she knew was not proper (a matter that is further addressed herein). The point, however, is that defense counsel committed error when he failed to object or voice opposition to the testimony of both persons and the failure to do so constituted reversible error. *State v. Lamshire*, 74 Wn.2d 888, 447 P.2d 727 (1968); *State v. Bowen*, 12 Wn.App 604, 531 P.2d 837 (1975)

i. Ninth, while it appears that afterward defense counsel tried to make amends to some extent by preparing and filing a post-trial motion and therein argued and acknowledged that he mismanaged the case and committed ineffective assistance of counsel by citing a couple of his omissions, he thereafter committed more error. That is, even though he was aware that a viable ground for a new trial was newly discovered evidence, and even though he became aware on the day of sentencing that A.S., a minor,

had undergone a medical or sexual examination on February 2, 2010 and that the prosecution had failed to reveal the existence and results of and/or provide reports of the same (which under the circumstances one can assume was favorable to the defense), he neglected to amend the written motion and/or to at least make an oral application for a new trial based on this new information. Instead, he simply “submitted” and relied on his written motion which contained absolutely no mention of this issue. In and of itself, this was error and constituted ineffective assistance of counsel.

Summing up, the defendant recognizes and concedes that he was not entitled to a perfect trial, and that in all likelihood such does not exist. However, he was entitled to a fair trial and to effective assistance of counsel and that means an attorney that provided representation that insured him of due process of law. All of that being said, that did not occur in this case. Rather, in its totality, counsel’s conduct fell below the standard of reasonableness necessary for this case and for the defendant to receive a fair trial, that prejudice to the defendant most certainly occurred, and but for defense counsel’s inappropriate conduct the results would have been different.

**2. THE PROSECUTOR ENGAGED IN MISCONDUCT
WHICH DEPRIVED THE DEFENDANT OF A FAIR
TRIAL AND DUE PROCESS OF LAW.**

On this point, and as the court well knows and has previously ruled, the prosecuting attorney represents the people and is expected and presumed to act with impartiality in the interest only of justice. *State v. Fisher*; *State v. Reed*, 102 Wn.2d 140, 684 P.2d 699 (1984) (quoting *State v. Case*, 49 Wn.2d 66, 299P2d 500 (1986)) In fact, prosecuting attorneys are quasi-judicial officers who have a duty to subdue their

courtroom zeal for the sake of fairness to a criminal defendant. *State v. Davenport*, 100 Wn.2d 757, 675 P.2d 1213 (1984) Further, prosecutors are duty bound to provide any and all potentially exculpatory or favorable evidence to the defense prior to trial, and withholding such evidence violates due process and is grounds for reversal in and of itself. *Brady v. Maryland*, 373 U.S, 83 (1963); *Giglio v. U.S.*, 450 U.S. 150 (1972) Such evidence includes statements of witnesses, physical evidence, or anything else that could conflict with prosecution witnesses, or could be used to impeach credibility, or in any other way could potentially impact on the person's guilt or to his or her punishment. When a claim of prosecution misconduct is made, the burden rests on the defendant to show that the prosecuting attorney's conduct was both improper and prejudicial. *State v. Gregory*, 158 Wn.2d 759, 147 P.3d 1201 (2006) Once established, prosecutorial misconduct is grounds for reversal where there is a substantial likelihood that the improper conduct affected the jury. (*State v. Gregory*; *State v. Belgarde*, 110 Wn.2d 504, 755 P.2d 174 (1988) Here, the prosecutorial misconduct consisted of the following, and there is no question that the improper conduct affected the outcome of the case.

a. Failure to provide documentation and/or Brady Material

First, as has been indicated, it was alleged that A.S., a minor, had been victimized by the defendant on multiple occasions beginning in 2006 but that the most recent occasion and the subject of the complaint (Count 2) was an incident that occurred between 5/30/09 – 12/31/09 and which supposedly consisted of both digital penetration and the defendant placing his mouth on Ms. Sanders' vaginal area, conduct that could be verified (or disproved) by an examination. In addition to the court cases regarding Brady Material, Rule CrR 4.7 obligated the people to provide information and/or reports of any physical

examinations (to of course include sexual examinations of alleged victims) to the defense. Also, when Ms. Sanders gave testimony, the prosecutor made it a point to elicit that she was undergoing therapy for the alleged sexual misconduct engaged in the defendant but absolutely no questions were asked concerning medical/sexual examinations, and prior to trial the prosecution did not advise the defense that Ms. Sanders had undergone any medical or sexual examinations and they did not provide any reports of the same. However, via a Restitution Estimate Form tendered to the defendant on day of sentencing (and which is now part of the court record), defense counsel learned for the very first time that Ms. Sanders had been medically/sexually examined on February 2, 2010. And given that this information was hidden from the defense, one can legitimately assume that it would have been favorable to the defendant and that it revealed no evidence of digital or any other penetration.. It is therefore submitted that misconduct occurred when the prosecutor failed to honor her obligations under Brady or at least her obligations under Rule CrR 4.7. And noting that all of the counts were joined together, and that they thereby supported and/or impacted on each other, reversal of the defendant's entire conviction must be granted.

b. Error regarding the “rebuttal witnesses”

Second, the prosecutor committed error with regard to the testimony of K.H., a minor, and Kimberly Henle. As has been indicated, these witnesses were called as supposed rebuttal witnesses to the testimony of the defendant wherein he stated in a general denial that he did not engage any of the alleged misconduct. And as for A.S, a minor,, he also indicated that he had no logical explanation for her accusations against him, although he did state that their close relationship had started to negatively change 6-

8 months before his arrest. Therefore, and setting aside the hearsay aspect, there was no legitimate basis for the testimony of either witness. That is, whether or not A.S, a minor, had made some mention of touching, etc. to K.H, a minor, and her then making some mention to her mother did not constitute rebuttal evidence.

And as for a possible claim that it was used to offset the issue that A.S, a minor, did not timely report any of the alleged abuse to anyone, again this is without merit. As has been indicated, and similar to what occurred in *State v. Fisher*, it was not the defense that raised the issue so as to open any doors; rather it was the prosecutor who asked questions, etc. so as to raise the issue with the obvious intent to then improperly call these witnesses to elicit their testimony. And while it is true that defense counsel did not object, and that in general terms failure to object constitutes waiver on appeal, such is not the case when the misconduct is flagrant and ill-intentioned so as to evince an enduring and resulting prejudice, which was certainly the situation herein. *State v. Gregory*(quoting *State v. Stenson*, 132 Wn.2d 668, 940 P.2d 1239 (1997))

c. Error in closing remarks

Third, as for her closing remarks, it is submitted that the prosecutor made several errors which deprived the defendant of due process of law and a fair trial. In that regard, she inappropriately appealed to passion and prejudice in attempting to inflame the jury for the purpose of securing a conviction. Having said that, it is acknowledged that in the context of closing argument, prosecutors are given wide latitude in making arguments and they are allowed to draw reasonable inferences from the evidence. *State Fisher*; *State v. Gregory*; (citing *State v. Gentry*, 125 Wn.2d 570, 888 P.2d 1105 (1995)). However, references to matters outside of the record and/or bald appeals to passion and

prejudice constitute misconduct (*State v Belgarde*), and that was the situation herein. In fact, the conduct was so improper that it finally got defense counsel to voice objections.

For example, in obviously trying to create the notion of sexual disposition on the part of the defendant and clearly trying to appeal to passion and prejudice in that regard, the prosecutor improperly asked the men on the jury to think about the impropriety of grown men hanging out with teengirls and what that translated into. The judge chastised the prosecutor for those remarks. Further, the prosecutor offered her own opinions about how an innocent person would or should react to these allegations and asked the jury to think about their emotions as opposed to how the defendant acted. And when the defense counsel objected and approached the bench to have discussions with the judge, the prosecutor made facial gestures for the jury to see, an act of misconduct that by itself could result in reversal. (*State v. Swan*, 114 Wn.2d 613, 769 P.2d 610 (1990) Again, the judge chastised the prosecutor for those remarks and conduct and told her to “Try to make it a little less personal.” (TT, p611) And “ You might tone it down a little bit, the dramatics.” (TT, p611) And then the prosecutor resorted to distorting the testimony given by the defendant and suggesting to the jury that in order to to acquit the defendant they had to believe that the girls were lying, misconduct in and of itself. *State v. Barrow*, 60 Wn.App 869, 809 P.2d 209 (1991); *State v. Casteneda-Perez*, 61 Wn.App 354, 810 P2d 74 (1991); *State v. Riley*, 69 Wn.App 353, 848 P.2d 1288 (1993); *State v. Fleming*, 83 Wn.App 209, 921 P.2d 1076 And where there is a substantial likelihood that the prosecutor’s conduct affected the jury’s verdict the defendant is deprived of the fair trial guaranteed by the Fourteenth Amendment. *State v. Belgarde*, 110 Wn.2d 504, 755 P.2d 174 (1988); *State v. Manthie*, 39 Wn.App 815, 696 P.2d 33 (1985) Also, contrary to any

argument she may raise, this was not a situation where the improper remarks by the prosecutor could be ignored because the legally proper evidence was overwhelming. State v. Allyn, 40 WnApp 27, 696 p2d 45 (1985) Respectfully, as has been indicated above, absent the testimony of the girls themselves, there was absolutely no evidence supporting that a crime has been committed, let alone involving the defendant. Under these circumstances, all of the inappropriate and improper conduct in this matter, either individually or taken together requires a reversal of the conviction.

**3. THE TRIAL COURT COMMITTED ERROR WHICH
DEPRIVED THE DEFENDANT OF A FAIR TRIAL
AND DUE PROCESS OF LAW**

Concerning this matter, it is without question that judges have both the authority and responsibility to control the conduct of trial proceedings, and to make rulings as issues of law are presented in order to insure that the defendant receives a fair trial and due process of law. Difficulties arise, and an accused is entitled to a new trial, however, when the judge's rulings are improper and/or they otherwise result in the defendant not receiving a constitutionally guaranteed fair trial. Respectfully, that is what occurred herein and therefore the defendant must receive a new trial.

a. Error in restricting the number of defense exhibits

First, the judge erred when he restricted the number of photographs or exhibits the defense could offer into evidence during the cross examination of E.W, a minor, Williams. As the record reflects, Ms. Williams' testimony was that she had been sexually abused by the defendant starting in 2002 and that the abuse continued into 2006 but that she then was able to move out of town and from that point forward she totally

avoided the defendant and had no further contact with him. On cross examination, however, defense counsel tried to demonstrate that such was not true and that Ms. Williams actually continued making contact with the defendant by sending him emails, by sending him photographs, by inviting him to her graduation, by going on trips in his company, etc. And relative to that line of questioning, defense counsel marked about a dozen photographs to corroborate the defense position. But upon the prosecutor objecting based on relevance, the court ordered that the defense counsel limit the number of photographs by stating, "Why don't you pick two or three of these and I'll admit two or three of them. They have minimal relevance but I don't think they have any prejudice." (TT, p400) With all due respect, this ruling was unduly restrictive and constituted error.

As this court well knows, the Sixth Amendment confrontation clause guarantees to a defendant the right and opportunity to confront the witnesses against him through cross examination. *Delaware v. Van Arsdall*, 475 U.S. 673, 106 S. Ct. 1431 Also, a defendant has a right to confront the witnesses against him with bias or impeachment evidence so long as the evidence is at least minimally relevant. *State v. Hudlow*, 99 Wn.2d 1, 659 P.2d 514 (1983) And for the purpose of providing information that the jury can use during deliberations to test the accuracy, reliability and credibility of that witness. *State v. Fisher*; *State v. Dolan*, 118 Wn.App 323, 73 P.3d 1011 (2003); *State v. Harmon*, 21 Wn.2d 581, 152 P.2d 314 (1944); *State v. Darden*, 145 Wn.2d 612, 41 P.3d 1189 Given the purpose of these photographs and the judge's determination that they had at least minimal relevance, it was error for the judge to rule that the defense could only offer 2 or 3 of them into evidence.

b. Error in restricting the number of character witnesses

Second, the judge erred with respect to his rulings regarding character witnesses and when he thereby restricted the number of character witnesses the defense could call and/or prohibited the defense from calling additional witnesses. As the record reflects, defense counsel expressed an intention to call several witnesses who would testify as to the defendant's favorable character regarding sexual morality. The prosecution opposed and based thereon the defense was forced to engage voir dire of each witness before their testimony would be allowed on that issue, which was bad enough. Thereafter, however, the situation got worse when the court ruled that the necessary foundation for admissibility, which he classified as a very stiff burden, was not met regarding Susan Meeks, Dan Haerberlin, and Tina Nelson, and based thereon defense counsel did not bother calling and withdrew Violet Greenough as a witness. With regard to this matter, it is submitted that the court misunderstood the requirements associated with character evidence and erred with its rulings.

As the court is aware, evidence concerning the reputation or character of a defendant can be presented during a trial when such evidence relates to an issue relevant to the charges that are pending or involved in the proceeding. Rule ER And with regard to this evidence, the witnesses must show that they are qualified to speak on the subject by showing that they are so situated within the community that they would have likely heard any comments concerning the character of the defendant that is in issue. *State v. Arine*, 182 Wn.2d 697, 48 P.2d 249 (1935) Further, a community is not limited to just where the witness resides, and includes such factors as the role a person plays in the community,

the number of people in the community, the frequency of contact between members of the community, whether the witness is in the position to hear about the person in connection with his or her involvement in the community, etc. *State v. Land*, 121 Wn.2d 494, 851 P.2d 678 (1991); *State v. Lord*, 117 Wn.2d 829, 822 P.2d 177 (1991); *State ex rel Carroll v. Junker*, 79 Wn.2d 12, 482 P.2d 775 (1971) And evidence of an accused person's sexual morality is a pertinent character trait in cases involving sexual offenses against minors. *State v. Woods*, 117 Wn.App 278, 70 P.3d 976 (2003)

With all due respect, and given that this case related to the prosecution's claim that the defendant was a sexual pedophile who groomed and then sexually abused female children, and that it hinged on the credibility of the girls that were called as alleged victims (and no other independent evidence existing), it was incumbent that the defense be able to call witnesses who could and would state that the defendant was not such a person and who in fact had a reputation for favorable sexual morality. The court preventing the same and/or restricting the number of defense witnesses concerning the same deprived the defendant of due process of law and reversal of the conviction is therefore required.

c. Error in restricting the number and content of defense witnesses

Third, the judge erred with respect to his rulings which resulted in other defense witnesses not being allowed to give testimony favorable to the defendant. For example, following the circumstance and the court's rulings as to character witnesses, defense counsel attempted to call witnesses who could and would give testimony stating that they observed the defendant in the company of some or all of the alleged victims at times that were subsequent to the alleged misconduct and that what they saw was girls that laughed,

joked, talked, etc. with the defendant and who exhibited and expressed absolutely no trepidation or fear (or anything else that might be considered negative) with respect to the defendant. This evidence was clearly intended to offset the girls' testimony and the prosecutor's position that the girls were fearful of the defendant and/or that they were trying to avoid the defendant after the abuse. However, despite the defense listing 24 people as possible witnesses, and only 5 having been called on this issue, the court ruled that the defense could only call 3 more witnesses, and therefore only three more such witnesses were called. (TT, p483) This was an improper restriction on the right of the defendant to defend himself.

d. Error in prohibiting Joseph Lee as a defense witness

And then came the issue regarding Joseph Lee. As has been indicated above, Mr. Lee was in the position to offer testimony that rebutted or offset the testimony of E.W., a minor, regarding her claim that she left the area and had no more contact or communication with the defendant after his last series of abuses toward her. As has been noted above, however, defense counsel failed to include him on the original witness list but upon realizing the same he made application to have him testify. However, the judge ruled that the defense could not call him as a witness, stating, "I think, given the whole situation, it's not appropriate to allow him to testify." (TT, p508) Respectfully, this was an improper restriction on the right of the defendant to defend himself.

e. Error in denying the defense post trial motion

Lastly, the judge erred when he denied the defense post-trial motion to set aside the verdict and to grant a new trial for the defendant. On this point, the defendant acknowledges that the evidence actually presented to the jury (setting aside for the

moment the propriety of the same) could arguably be viewed as sufficient to support the jury's verdict and therefore any such argument by the prosecution could seemingly have merit. The defendant also recognizes that the Motion was abbreviated and did not contain all of the areas of ineffective assistance of counsel set forth herein, nor did it contain the extremely important issue of the prosecutor failing to provide Brady Material or information or documentation pertaining to the medical or sexual examination performed on A.S., a minor, on February 2, 2010, as was their obligation. However, in light of all of the circumstances, defense counsel identified enough issues to satisfy Rule CrR 7.5 and to establish that substantial justice had not been done and to require the court to grant the application and such should have been done.

4. CUMULATIVE ERROR DENIED MR. TRAINOR A FAIR TRIAL

It is well settled that the combined effects of error may require a new trial, even when those errors individually may not require reversal. *State v. Coe*, 101 Wn.2d 772, 789, 884 P.2d 668 (1984); *United States v. Preciado-Cordobas*, 981 F.2d 1206, 1215 n.8 (11th Cir. 1993) (recognizing that cumulative error can deny a defendant due process even where the individual errors are harmless). Reversal is required where the cumulative effect of several errors is so prejudicial as to deny the defendant a fair trial. *Mak v. Blodgett*, 970 F.2d 614 (9th Cir. 1992); *United States v. Pearson*, 746 F.2d 789, 796 (11th Cir. 1984)

In this case, the many errors, either individually or cumulatively, denied Mr. Trainor a fair trial. In fact, the case was replete with error from the beginning with defense counsel not engaging in effective assistance, with the prosecutor not providing required and/or favorable information and/or documentation and then compounding the error with

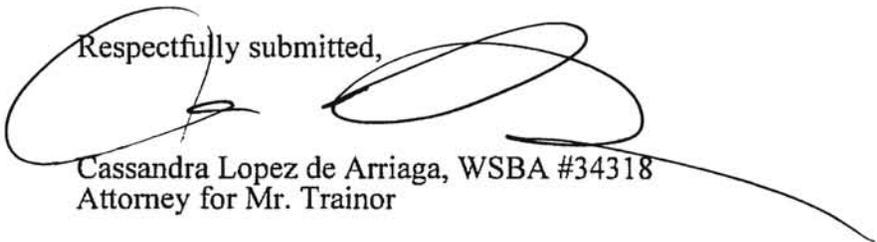
her conduct at trial, and with the court committing error with its various rulings. In light of the same, Mr. Trainor is entitled to a new fair trial because the errors were not harmless and that within a reasonable probability the outcome of the trial would have been different had the errors not occurred. State v. Jackson, 102 Wn.2d 689, 689 P.2d 76 (1984)

E. CONCLUSION

Appellant respectfully submits that his conviction should be reversed and remanded for retrial.

DATED this 27th day of October, 2011

Respectfully submitted,


Cassandra Lopez de Arriaga, WSBA #34318
Attorney for Mr. Trainor

1 IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

2 DIVISION 3

3 STATE OF WASHINGTON,

4 Plaintiff,

5 vs.

6 ROBERT RUSSELL TRAINOR,

7 Defendants.

NO. 294293

10-1-00077-5

PROOF OF SERVICE

9 I, Cassandra Lopez, declare at the time of service I was at least 18 years of age and not a
10 party to the legal action.

11 I served a copy of the APPEAL BRIEF on October 27th, 2011, by **FIRST CLASS**
12 **MAIL** as follows:

13 **Spokane Court Appeals, Division 3**
14 **Renee Townsley**
15 **Clerk of the Court of Appeals for the State of Washington**
16 **500 N. Cedar St.**
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23 I certify under penalty of perjury under the laws of the State of California that the
24 foregoing is true and correct. Executed this 27th day of October, 2011.

25 
26 Cassandra Lopez De Arriaga
27 Attorney for Appellant
28 WSBA # 34318

PROOF OF SERVICE