

No. 34031-7-III

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

STATE OF WASHINGTON,

Respondent,

v.

JOSHUA W. BRINK,

Appellant.

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

The Honorable Annette S. Plese

APPELLANT'S OPENING BRIEF

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TABLE OF CONTENTS

A. SUMMARY OF ARGUMENT 1

B. ASSIGNMENTS OF ERROR 2

C. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR 2

D. STATEMENT OF THE CASE..... 3

E. ARGUMENT.....12

Issue 1: Whether the State committed prosecutorial misconduct during closing argument by vouching for the credibility of expert witness Dr. Michelle Messer, misstating and shifting the burden of proof, and introducing facts not in evidence 12

a. Whether the State committed prosecutorial misconduct by vouching for expert witness Dr. Michelle Messer in the case..... 13

b. Whether the State committed prosecutorial misconduct by misstating and shifting the burden of proof in closing argument 15

c. Whether Mr. Brink was denied his Sixth Amendment right to effective assistance of counsel when defense counsel failed to object to the improper statements in the prosecutor’s closing argument 19

Issue 2: Whether Mr. Brink was denied his Sixth Amendment right to effective assistance of counsel 20

a. Whether Mr. Brink was denied his Sixth Amendment right to effective assistance of counsel when defense counsel failed to object to expert witness Dr. Michelle Messer’s speculative and irrelevant testimony 21

b. Whether Mr. Brink was denied his Sixth Amendment right to effective assistance of counsel when defense counsel failed to object to witness testimony expressing an opinion on the defendant’s guilt..... 27

c. Whether Mr. Brink was denied his Sixth Amendment right to effective assistance of counsel when defense counsel failed to object to the improper statements in the prosecutor’s closing argument 30

Issue 3: Whether the trial court abused its discretion by admitting photographs when their prejudicial effect outweighed their probative value.....31

Issue 4: Whether the cumulative errors in this case require reversal.....34

Issue 5: Whether the trial court erred in imposing a total term of confinement and community custody that exceeds the statutory Maximum.....36

Issue 6: Whether this Court should refuse to impose costs on appeal40

F. CONCLUSION.....45

TABLE OF AUTHORITIES

United States Supreme Court

Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052,
80 L. Ed. 2d 674 (1984).....20, 21

Federal Court

United States v. Brooks, 508 F.3d 1205 (9th Cir. 2007).....13, 14

Washington Supreme Court

City of Richland v. Wakefield, 380 P.3d 459 (2016).....44, 45

In re Personal Restraint of Brooks, 166 Wn.2d 664,
211 P.3d 1023 (2009).....36, 37

In re Pers. Restraint of Glasmann, 175 Wn.2d 696,
286 P.3d 673 (2012).....19, 30

Staats v. Brown, 139 Wn.2d 757, 991 P.2d 615 (2000).....44

State v. Bahl, 164 Wn.2d 739, 193 P.3d 678 (2008).....36

State v. Blank, 131 Wn.2d 230, 930 P.2d 1213 (1997).....42, 44

State v. Blazina, 182 Wn.2d 827, 344 P.3d 680 (2015).....40, 41, 42, 43, 44

State v. Boyd, 174 Wn.2d 470, 275 P.3d 321 (2012).....37, 38, 40

State v. Demery, 144 Wn.2d 753, 30 P.3d 1278 (2001)27, 28

State v. Dhaliwal, 150 Wn.2d 559, 79 P.3d 432 (2003)13

State v. Finch, 137 Wn.2d 792, 975 P.2d 967 (1999).....31

State v. Grier, 171 Wn.2d 17, 246 P.3d 1260 (2011)21

State v. Hicks, 163 Wn.2d 477, 181 P.3d 831 (2008).....21

State v. Ish, 170 Wn.2d 189, 241 P.3d 389 (2010)13, 14, 30

<i>State v. Jacobs</i> , 154 Wn.2d 596, 115 P.3d 281 (2005).....	36
<i>State v. Jones</i> , 95 Wn.2d 616, 628 P.2d 472 (1981).....	31, 32
<i>State v. Kirkman</i> , 159 Wn.2d 918, 155 P.3d 125 (2007).....	27, 30
<i>State v. Kyllo</i> , 166 Wn.2d 856, 215 P.3d 177 (2009).....	20
<i>State v. Lindsay</i> , 180 Wn.2d 423, 326 P.3d 125 (2014).....	15, 30
<i>State v. Lord</i> , 117 Wn.2d 829, 822 P.2d 177 (1991).....	31
<i>State v. McFarland</i> , 127 Wn.2d 322, 899 P.2d 1251 (1995).....	21, 22
<i>State v. Perez-Valdez</i> , 172 Wn.2d 808, 265 P.3d 853 (2011).....	32
<i>State v. Quaale</i> , 182 Wn.2d 191, 340 P.3d 213 (2014).....	28
<i>State v. Sutherby</i> , 165 Wn.2d 870, 204 P.3d 916 (2009).....	20
<i>State v. Thomas</i> , 109 Wn.2d 222, 743 P.2d 816 (1987).....	21, 22
<i>State v. Thomas</i> , 150 Wn.2d 821, 83 P.3d 970 (2004).....	32
<i>State v. Thorgerson</i> , 172 Wn.2d 438, 258 P.3d 43 (2011).....	12
<i>State v. Warren</i> , 165 Wn.2d 17, 195 P.3d 940 (2008).....	13

Washington Courts of Appeal

<i>Cho v. City of Seattle</i> , 185 Wn. App. 10, 341 P.3d 309 (2014), <i>review denied</i> , 183 Wn.2d 1007, 349 P.3d 857 (2015).....	23, 24
<i>Miller v. Likins</i> , 109 Wn. App. 140, 34 P.3d 835 (2001).....	22, 23, 24
<i>State v. Anderson</i> , 153 Wn. App. 417, 220 P.3d 1273 (2009), <i>review denied</i> , 170 Wn.2d 1002, 245 P.3d 226.....	15-16, 18
<i>State v. Berube</i> , 171 Wn. App. 103, 286 P.3d 402 (2012).....	15

<i>State v. Braham</i> , 67 Wn. App. 930, 841 P.2d 785 (1992), <i>amended</i> (Jan. 4, 1993)	24-25
<i>Stedman v. Cooper</i> , 172 Wn. App. 9, 292 P.3d 764 (2012)	22, 24,26
<i>State v. Evans</i> , 163 Wn. App. 635, 260 P.3d 934 (2011), <i>remanded and affirmed in an unpublished opinion</i> , 174 Wn. App. 1049 (April 23, 2013).....	18
<i>State v. Jones</i> , 144 Wn. App. 284, 183 P.3d 307 (2008)	19, 20
<i>State v. Lopez</i> , 95 Wn. App. 842, 980 P.2d 224 (1999).....	34, 36
<i>State v. Mahone</i> , 98 Wn. App. 342, 989 P.2d 583 (1999)	42
<i>State v. Ramos</i> , 164 Wn. App. 327, 263 P.3d 1268 (2011)	13
<i>State v. Sinclair</i> , 192 Wn. App. 380, 367 P.3d 612 (2016).....	40
<i>State v. Smiley</i> , 195 Wn. App. 185, 379 P.3d 149 (2016).....	27
<i>State v. Venegas</i> , 155 Wn. App. 507, 228 P.3d 813 (2010).....	16, 17, 18
<i>State v. Winborne</i> , 167 Wn. App. 320, 273 P.3d 454 (2012) ..	36, 37, 39, 40

Washington Statutes

RCW 9A.20.021.....	37
RCW 9A.20.021(1)(b)	39
RCW 9A.20.021(1)(c)	39
RCW 9A.36.130(2).....	39
RCW 9.94A.030(55)(ix)	39
RCW 9.94A.535(3)(b)	6
RCW 9.94A.535(3)(n)	6
RCW 9.94A.701(2).....	39

RCW 9.94A.701(9).....	37, 38, 39, 40
RCW 10.01.160	41
RCW 10.01.160(4).....	42
RCW 10.73.160(1).....	44
RCW 10.73.160(3).....	41
RCW 10.73.160(4).....	42
RCW 10.82.090(1).....	42
RCW 26.50.110(5).....	37

Court Rules

GR 14.1	18
GR 34	43
GR 34(a)(3).....	43
RAP 15.2(e)	43
RAP 15.2(f).....	43

Other Authorities

ER 402	24
ER 403	24
ER 702	22, 24

Constitutional Provisions

U.S. Const. Amend. VI.....	20
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A. SUMMARY OF ARGUMENT

Joshua Wade Brink was convicted of second degree assault of a child.

During its closing argument the State committed misconduct by vouching for the credibility of the State's expert witness (Dr. Michelle Messer), misstating and shifting the burden of proof, and arguing facts not in evidence. Defense counsel was ineffective for failure to object to witness testimony opining on the defendant's guilt, allowing the State's expert witness to present damaging speculative testimony, and for failing to object to the State's prejudicial misconduct in closing argument.

Because the majority of the evidence in this case was based upon the credibility of the expert witness, the errors prejudiced the defendant. Also, the trial court abused its discretion by admitting extraneous copies of gruesome photographs. For these reasons, Mr. Brink respectfully requests this Court reverse his conviction and remand the case for a new trial.

At sentencing the trial court erred in sentencing Mr. Brink to 120 months of incarceration plus 18 months of community custody, which exceeded the statutory maximum of 120 months. The case must be remanded for resentencing.

Mr. Brink objects to any appellate costs should the State prevail on appeal.

B. ASSIGNMENTS OF ERROR

1. The State committed misconduct by vouching for the credibility of an expert witness, Dr. Michelle Messer.
2. The State committed misconduct by misstating and shifting the burden of proof.
3. The State committed misconduct by arguing facts not in evidence.
4. Defense counsel was ineffective for failing to object to witness testimony which stated an opinion on the defendant's guilt.
5. Defense counsel was ineffective for failing to object to speculative testimony from an expert witness, Dr. Michelle Messer.
6. Defense counsel was ineffective for failing to object to the State's misconduct during closing argument.
7. The trial court erred in admitting extraneous photographs which were prejudicial.
8. The cumulative errors of the State, trial court, and defense counsel warrant reversal.
9. The trial court erred in sentencing the defendant beyond the statutory maximum.
10. An award of costs on appeal against the defendant would be improper.

C. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

Issue 1: Whether the State committed prosecutorial misconduct during closing argument by vouching for the credibility of expert witness Dr. Michelle Messer, misstating and shifting the burden of proof, and introducing facts not in evidence.

- a. Whether the State committed prosecutorial misconduct by vouching for expert witness Dr. Michelle Messer in the case.

- b. Whether the State committed prosecutorial misconduct by misstating and shifting the burden of proof in closing argument.
- c. Whether the State committed prosecutorial misconduct by arguing facts not in evidence.

Issue 2: Whether Mr. Brink was denied his Sixth Amendment right to effective assistance of counsel.

- a. Whether Mr. Brink was denied his Sixth Amendment right to effective assistance of counsel when defense counsel failed to object to expert witness Dr. Michelle Messer's speculative and irrelevant testimony.
- b. Whether Mr. Brink was denied his Sixth Amendment right to effective assistance of counsel when defense counsel failed to object to witness testimony expressing an opinion on the defendant's guilt.
- c. Whether Mr. Brink was denied his Sixth Amendment right to effective assistance of counsel when defense counsel failed to object to the improper statements in the prosecutor's closing argument.

Issue 3: Whether the trial court abused its discretion by admitting photographs when their prejudicial effect outweighed their probative value.

Issue 4: Whether the cumulative errors in this case require reversal.

Issue 5: Whether the trial court erred in imposing a total term of confinement and community custody that exceeds the statutory maximum.

Issue 6: Whether this Court should refuse to impose costs on appeal.

D. STATEMENT OF THE CASE

In November of 2012, Joshua Wade Brink and his girlfriend Ashley Brown lived together in Elk, Washington. (RP 144, 191–192).

Brown's two-year-old son, K.S.D.,¹ also lived with them. (RP 143-144, 191-192). Although K.S.D. was not Mr. Brink's biological son, Mr. Brink cared for K.S.D. as though he were. (RP 192-193).

On some days Mr. Brink would take K.S.D. to work with him when he was logging. (RP 193). A co-worker, Alex Groce, would often assist in watching K.S.D. while Mr. Brink worked. (RP 193-194).

On November 29, 2012, Mr. Brink brought K.S.D. home after having K.S.D. at work with him. (RP 196). When they arrived home they took their boots and coats off and put wood in the wood stove. (RP 197). Because Mr. Brink and K.S.D. would get dirty while working, they usually showered when they got home. (RP 194, 197). Mr. Brink took K.S.D.'s clothes off and asked K.S.D. if he needed to use the potty. (RP 197). K.S.D. said he did, so Mr. Brink set him on the toilet. (RP 197). While K.S.D. used the toilet, Mr. Brink undressed and set out new clothes for K.S.D. for after their shower. (RP 197-198).

Mr. Brink was preparing himself to shower but thought he heard Ms. Groce's loud diesel truck coming up the driveway. (RP 198; Exhibit P 22, p. 1). K.S.D. finished using the toilet and Mr. Brink took K.S.D. off of the toilet, put K.S.D. into the empty bathtub, and told K.S.D. to stay

¹ Initials are used to protect the identity of the minor in this case pursuant to this Court's General Order dated June 18, 2012.

there. (RP 198). The tub faucet was off. (RP 198–199). Mr. Brink went to greet Ms. Groce at the front door. (RP 199). Ms. Groce frequently came by after work so she and Mr. Brink could coordinate filling their fuel slip tanks. (RP 199).

According to Mr. Brink, he was talking to Ms. Groce and had just pulled a casserole out of the oven² when he heard K.S.D. screaming in the bathroom. (RP 205). Mr. Brink ran in to find steam and K.S.D. with tears on his face, scrunched up sitting on his bottom near the front of the tub. (RP 220; Exhibit P22, p. 1; Exhibit P27, 12:44–13:18). K.S.D.’s legs were up with his knees bent, and his feet against the front of the tub. (*Id.*). Mr. Brink noticed K.S.D. was using the walls of the tub to balance himself. (Exhibit P 22, p. 1). The hot water handle was turned on and the cold water handle was completely off. (RP 206; Exhibit P 22, pp. 1–2). The tub’s stopper had been left open so the water could drain from the tub since he and K.S.D. had intended to shower. (RP 222, 232–233).

Mr. Brink immediately grabbed K.S.D. out of the tub and shut the water off. (RP 207). He then placed K.S.D. in cool water in the tub and proceeded to care for K.S.D. by checking his skin and using burn cream from Ms. Groce’s truck. (RP 207, 209–210). He called Ms. Brown and

² Brown had left a casserole in the oven for K.S.D. and Brink before she left for work. (Exhibit P27, 2:27–2:46).

told her to come home. (RP 148, 208). After Ms. Brown came home, she and Mr. Brink went to Walmart for supplies to treat K.S.D.'s burn. (RP 212; Exhibit P27, 7:05–7:11). Mr. Brink and Ms. Brown consulted various individuals about how to care for K.S.D.'s burns, and took care to treat him. (RP 159–160, 164–165).

About a week later, on December 7, K.S.D. was taken to the hospital because he was acting differently and the burn seemed to have taken a turn for the worse. (RP 151, 214–216).

At the hospital, Dr. Michelle Messer was on call when K.S.D. was admitted for treatment. (RP 63). She completed a physical exam of K.S.D. and did not think the burn pattern on K.S.D.'s bottom and scrotum was consistent with an accidentally-inflicted burn. (RP 65, 71–73, 75–77). Ultimately, she concluded the burn was abusive in nature. (RP 78).

The State charged Mr. Brink with one count of second degree assault of a child.³ (CP 1). The case proceeded to a jury trial. (RP 56–234). Witnesses testified consistent with the facts stated above. (RP 56–234).

³ The State also alleged the aggravating circumstances that the defendant “knew and should have known that the victim of the current offense was particularly vulnerable or incapable of resistance, as provided by RCW 9.94A.535(3)(b); and the defendant used his . . . position of trust, confidence, or fiduciary responsibility to facilitate the commission of the current offense, as provided by RCW 9.94A.535(3)(n).” (CP 1). The jury returned a verdict of “yes” as to these aggravating circumstances, but they are not challenged in this appeal. (CP 175-187; RP 281).

Mr. Brink testified consistent with the facts above, as well as in the written and audio statements he had previously given on different occasions to law enforcement. (Exhibit P22, dated 12/07/12; Exhibit P27, dated 01/30/13). In the recorded statement, which was played at trial, Mr. Brink explained he did not hear K.S.D. turn on the water in the bathroom due to various noises in the trailer, including noise from the wood stove fan and the TV. (RP 127, 178; Exhibit P27, 4:46–4:56, 13:20–13:47; Exhibit P22, p. 1).⁴

On cross examination, the State asked how Mr. Brink felt about potty training K.S.D. (RP 228). The State asked whether Mr. Brink was frustrated when K.S.D. pooped his pants, and whether he was “perfectly calm” about it. (RP 228). Mr. Brink replied he was not frustrated, he was calm about it, and it was “pretty normal.” (RP 228).

When the State asked Ms. Brown about potty training K.S.D., Ms. Brown noted that Mr. Brink was “very adamant” that K.S.D. learn how to use the potty. (RP 146–147). When asked how the relationship was between K.S.D. and Mr. Brink, Ms. Brown said it was “great.” (RP 167). Ms. Brown testified it was hard for her to assume the burns were intentional because “you know, I would think that if a child was getting abused by somebody, that child would not want to be around that person,

⁴ The sound of the fan can be heard in the audio recording. (Exhibit P27).

but at the same time, he was still wanting to be around [Mr. Brink], you know. He would want to go outside and play with [Mr. Brink].” (*Id.*).

However, on redirect examination the State asked:

[STATE]: Ms. Brown, has your understanding changed?

[BROWN]: Yes.

[STATE]: Can you explain that?

[BROWN]: I believe now after listening to the experts and seeing, you know, the reports and everything that it was done on purpose.

(RP 168). Defense counsel did not object. (RP 168).

Dr. Messer testified she is a board-certified pediatrician and has experience and training in recognizing child abuse. (RP 61–62). She researched abusive burns in preparation for this case and noted the burns covered the buttocks, underside of the penis, and the anus. (RP 62, 68). Dr. Messer stated she did not believe the burns occurred the way they were described to her, as those parts of the body which touched the cool parts of the tub typically would have been spared from burns. (RP 68, 72–74). Dr. Messer also believed the burn pattern would have included splash marks or burns on the tops of a child’s feet. (RP 75–77). She could not “figure out how the kid would do this to himself” and thus concluded the burns were abusive. (RP 76–77).

The State asked Dr. Messer to explain the ways in which a burn might be abusive. (RP 77). She answered:

One of the things I thought about it sometimes it's difficult taking care of a two year old. I've had a few of those in my life, and they can be a challenge. You know, sometimes they poop at inappropriate moments or they get their hands in the diaper, and it goes everywhere, and you have to clean that up, and people get mad.

I could see where somebody could be so mad they would take the kid and use scalding hot water to clean him up.

That would produce this. That's one way.

Do I know for sure what happened to do that? No, I don't. I wasn't there, but that would be one way to cause this kind of a burn.

(RP 77). Defense counsel did not object to this testimony. (RP 77).

A deputy from the Spokane County Sheriff's office testified he contacted Mr. Brink and examined the tub and water heater the same day K.S.D. was admitted to the hospital. (RP 98, 101–104). The deputy tried the handles on the tub and they turned properly. (RP 106). He also turned on the hot water and put his hand under the tap, and after counting for 8 seconds he had to remove his hand because the water was too hot. (RP 106). The deputy took a written statement from Mr. Brink. (RP 106–107; Exhibit P22).

A detective also testified he interviewed Mr. Brink in the presence of his attorney, on January 30, 2013, at the trailer. (RP 170–171, 177; Exhibit P27). Three forensic specialists accompanied the detective, and Mr. Brink was asked to set the

water heater thermostat to the same setting it was at the night K.S.D. was burned. (RP 173–174). One of the forensics experts testified that the following measurements were taken: when the hot water tap ran for ten seconds the water was at 120 degrees, at 20 seconds it was at 142 degrees, and at 40 seconds it was at 152 degrees. (RP 128–129, 133–134). Also, it was noted the faucet handles were easy to turn. (RP 136).

In closing argument, the State argued the following:

“The doctor told you beyond a reasonable doubt—without hesitation, without hesitation at all that this was not nonaccidental. She gave a thorough and good consideration. So if it didn’t happen that way, which way did it happen?” (RP 259). Defense counsel did not object. (RP 259).

The courtroom minutes reflect the jury deliberated for almost a full day on the single count against Mr. Brink before coming to a verdict. (CP 158). But ultimately the jury found Mr. Brink guilty. (CP 175–187; RP 281)

The trial court imposed a sentence of 120 months of confinement and 18 months of community custody. (RP 291; CP 179–180). The trial court stated that whatever good time Mr. Brink received would be converted to community custody so as not to exceed the statutory maximum of 120 months. (RP 291). Yet the judgment and sentence only includes the

following notation: “[n]ote: combined term of confinement and community custody for any particular offense cannot exceed the statutory maximum.” (CP 180).

At sentencing the court only imposed the mandatory fines of \$800. (RP 292; CP 182).

The Judgment and Sentence contains boilerplate language stating the “court has considered the total amount owing, the defendant’s past, present, and future ability to pay legal financial obligations, including the defendant’s financial resources and the likelihood that the defendant’s status will change.” (CP 178). It also contains the following language: “An award of costs on appeal against the defendant may be added to the total legal financial obligations.” (CP 183).

Mr. Brink timely appealed his judgment and sentence. (CP 191). An order of indigency on file indicates Mr. Brink’s impoverished status. (CP 211–213). A Report as to Continued Indigency has been filed on the same day as this opening brief.

E. ARGUMENT

Issue 1: Whether the State committed prosecutorial misconduct during closing argument by vouching for the credibility of expert witness Dr. Michelle Messer, misstating and shifting the burden of proof, and introducing facts not in evidence.

During closing argument, the State presented the following:

“The doctor told you beyond a reasonable doubt—without hesitation, without hesitation at all that this was not nonaccidental. She gave a thorough and good consideration. So if it didn’t happen that way, which way did it happen?” (RP 259). Defense counsel did not object. (RP 259).

“To prevail on a claim of prosecutorial misconduct, the defendant must establish that the prosecutor’s conduct was both improper and prejudicial in the context of the entire record and the circumstances at trial.” *State v. Thorgerson*, 172 Wn.2d 438, 442, 258 P.3d 43 (2011) (citation and internal quotation marks omitted). If the defendant fails to object “at the time the misconduct occurred, he must establish that no curative instruction would have obviated any prejudicial effect on the jury” and that “prejudice resulted that had a substantial likelihood of affecting the jury verdict.” *Id.* at 455.

There are three ways the statements by the State were improper. First, the comment was improper because it vouched for the credibility of the expert witness, Dr. Messer. Second, the State’s argument misstated and shifted the burden of proof. Third, the argument misstated the

evidence because Dr. Messer never testified she believed Mr. Brink was guilty beyond a reasonable doubt of child abuse. The improper conduct was prejudicial to Mr. Brink’s right to a fair trial, as argued herein.

a. Whether the State committed prosecutorial misconduct by vouching for expert witness Dr. Michelle Messer in the case.

“It is misconduct for a prosecutor to state a personal belief as to the credibility of a witness.” *State v. Warren*, 165 Wn.2d 17, 30, 195 P.3d 940 (2008) (citations omitted); see also *State v. Dhaliwal*, 150 Wn.2d 559, 577–78, 79 P.3d 432 (2003). Improper vouching for a witness’ credibility occurs “if a prosecutor expresses his or her personal belief as to the veracity of the witness” *State v. Ish*, 170 Wn.2d 189, 196, 241 P.3d 389 (2010). A prosecutor also improperly vouches for the credibility of a witness by arguing that a witness is telling the truth. *State v. Ramos*, 164 Wn. App. 327, 341 n.4, 263 P.3d 1268 (2011) (finding the prosecutor improperly vouched for the credibility of witnesses by arguing they “were just telling you what they saw and they are not being anything less than 100 percent candid”). “Whether a witness has testified truthfully is entirely for the jury to determine.” *Ish* at 196 (citing *United States v. Brooks*, 508 F.3d 1205, 1210 (9th Cir. 2007)). “A prosecutor owes a defendant a duty to ensure the right to a fair trial is not violated.” *Ramos*, 164 Wn. App. at 333 (citation omitted).

The State improperly used the burden of proof to boost Dr. Messer as a credible and reliable witness. When the State argued during closing that Dr. Messer testified “beyond a reasonable doubt” the burns on K.S.D. were not accidentally inflicted, the State vouched for Dr. Messer’s credibility. (RP 259). The State does not have the authority to decide who is telling the truth and it certainly is not the entity which decides whether evidence has met the burden of proof—only the jury can do that. *Ish* at 196 (citing *United States v. Brooks*, 508 F.3d 1205, 1210 (9th Cir. 2007)). The State overstepped its role and dangerously undermined the jury’s function by doing so. This conduct was flagrant and ill-intentioned.

This improper vouching prejudiced the defendant’s right to a fair trial by encroaching upon the jury’s decision-making authority. *Ish*, 170 Wn.2d at 196 (“[w]hether a witness has testified truthfully is entirely for the jury to determine”). The case was substantially based on the credibility of Dr. Messer. The jury may have believed Mr. Brink’s testimony that K.S.D. was accidentally burned were it not for the State’s assertion that Dr. Messer testified “beyond a reasonable doubt” that the burns were intentionally inflicted. (RP 259). The State’s comment must have been confusing and misleading to the jury, as the State’s comment essentially took away the jury’s job to determine guilt. *Ish*, 170 Wn.2d at 196. The jury deliberated for nearly a day prior to returning a verdict, and

the only evidence implicating Mr. Brink was Dr. Messer's testimony that the burns could not have been inflicted accidentally. (CP 158; RP 72–77). No other evidence presented by the State was as important as Dr. Messer's testimony. (RP 56-185).

Defense counsel did not object to the prosecutor's improper statement. (RP 259). However, no curative instruction would have neutralized the comment the prosecutor made to the jury given the importance of Dr. Messer's testimony to the State's case.

Mr. Brink respectfully requests the case be remanded for a new trial.

b. Whether the State committed prosecutorial misconduct by misstating and shifting the burden of proof in closing argument.

“Arguments by the prosecution that shift or misstate the State's burden to prove the defendant's guilt beyond a reasonable doubt constitute misconduct.” *State v. Lindsay*, 180 Wn.2d 423, 434, 326 P.3d 125 (2014) (citation omitted). The State may not trivialize its burden of proof under the reasonable doubt standard. *State v. Berube*, 171 Wn. App. 103, 122, 286 P.3d 402 (2012). Arguments are improper if they minimize “the importance of the reasonable doubt standard and of the jury's role in determining whether the State has met its burden.” *State v. Anderson*, 153 Wn. App. 417, 431, 220 P.3d 1273 (2009), *review denied*, 170 Wn.2d

1002, 245 P.3d 226 (prosecutor discussed reasonable doubt standard in context of everyday decision making, which “trivialized and ultimately failed to convey the gravity of the State's burden and the jury's role . . .”). A prosecutor may not imply to a jury that it must find a defendant guilty “*unless* it [can] come up with a reason not to.” *Id.* (emphasis in original).

It is also prosecutorial misconduct for a prosecutor to use a “fill-in-the-blank” argument during closing, such as the one made in *State v. Venegas*. *State v. Venegas*, 155 Wn. App. 507, 523–25, 228 P.3d 813 (2010) (citations omitted) (finding misconduct from following statement: “In order to find the defendant not guilty, you have to say to yourselves: ‘I doubt the defendant is guilty, and my reason is’—blank.”). Similarly, in *State v. Anderson*, the court found the State’s “fill-in-the-blank” arguments were improper. 153 Wn. App. 417, 431, 220 P.3d 1273 (2009). A prosecutor may not imply a jury needs a reason to find a defendant not guilty, because it makes it seem as though the jury must find a defendant guilty “*unless* [the jury can] come up with a reason not to.” *Id.* Such an argument can imply a defendant is “responsible for supplying . . . a reason to the jury in order to avoid conviction.” *Id.* The implication that a jury has an initial affirmative duty to convict is improper—the jury must begin with a presumption of innocence. *Id.* The presumption of innocence continues throughout the entire trial “and may only be overcome, if at all,

during the jury's deliberations." *Venegas*, 155 Wn. App. at 524 (citations omitted).

Here, the prosecutor committed misconduct by minimizing the burden of proof in this case during closing argument. (RP 259). The statements had the effect of misstating the burden of proof—it is not a witness's role to determine whether a defendant is guilty beyond a reasonable doubt—it is the jury's role. Because of this misstatement, the prosecutor's assertion that Dr. Messer testified as to the defendant's guilt beyond a reasonable doubt trivialized the jury's part in the trial. (RP 259). The presumption of innocence is not overcome until the jury deliberates, and the State essentially instructed the jury otherwise. *Venegas*, 155 Wn. App. at 524 (citations omitted).

The prosecutor also committed misconduct by implying that unless Mr. Brink or the jury could come up with a different plausible explanation for the injuries to K.S.D., then Mr. Brink must be guilty:

The doctor told you beyond a reasonable doubt—without hesitation, without hesitation at all that this was not nonaccidental. She gave a thorough and good consideration. *So if it didn't happen that way, which way did it happen?*

(RP 259) (emphasis added). The prosecutor's rhetorical question is an argument that shifts the burden of proof to the defendant. (RP 259). Mr. Brink does not have the burden of proving the ways in which the burns to

K.S.D. were accidental—the State has the burden of proving why the burns were intentional. *Anderson*, 153 Wn. App. at 431 (prosecutor may not imply a jury needs a reason to find a defendant not guilty). It is not the jury’s responsibility to come up with a reason for why the defendant is not guilty. *Id.* It is the jury’s responsibility to decide in deliberations whether the prosecution presented enough evidence to overcome the presumption of innocence. *Venegas*, 155 Wn. App. at 524 (citations omitted).

Reversal is proper on basis of prosecutorial misconduct where evidence is not “so compelling that [the court] can say the jury would have reached the same verdict absent the improper arguments.” *State v. Evans*, 163 Wn. App. 635, 647, 260 P.3d 934 (2011), *remanded and affirmed in an unpublished opinion*, 174 Wn. App. 1049 (April 23, 2013).⁵ Given Dr. Messer’s opinion was the only crucial evidence the prosecution had in its case against Mr. Brink, the remaining evidence in this case was not so compelling that a jury would have reached the same verdict absent the improper arguments.

Mr. Brink’s right to a fair trial was prejudiced by the prosecutor’s misconduct and reversal is required.

⁵ Unpublished opinions of the Court of Appeals filed on or after March 1, 2013, may be cited as non-binding authorities, if identified as such by the citing party, and may be accorded such persuasive value as the court deems appropriate. GR 14.1 (Effective September 1, 2016).

c. Whether the State committed prosecutorial misconduct by arguing facts not in evidence.

It is error for a prosecutor to present, during closing argument, facts not admitted as evidence during trial. *In re Pers. Restraint of Glasmann*, 175 Wn.2d 696, 704–06, 286 P.3d 673 (2012). “The long-standing rule is that consideration of any material by a jury not properly admitted as evidence vitiates a verdict when there is a reasonable ground to believe that the defendant may have been prejudiced.” *Id.* at 705 (citations and quotations omitted). In *Glasmann*, the Court found that a prosecutor’s modifications to a booking photograph, which added in captions, was the “equivalent of unadmitted evidence.” *Id.* at 706. The Court found the conduct was flagrant and ill-intentioned. *Id.* at 707 (also finding cumulative effect of prosecutor’s misconduct was prejudicial).

A prosecuting attorney has some latitude to argue facts and inferences from the evidence, but it is improper to bolster a witness's credibility with facts not in evidence. *State v. Jones*, 144 Wn. App. 284, 293–94, 183 P.3d 307 (2008).

Dr. Messer never testified that she was sure “beyond a reasonable doubt” that the injuries K.S.D. had were intentionally inflicted. (RP 56–96). The prosecutor’s presentation that she testified as such “beyond a reasonable doubt” was improper because he argued a fact not in evidence. *Glasmann*, 175 Wn.2d. at 705. It is also improper to argue unadmitted

facts to bolster a witness's credibility. *Jones*, 144 Wn. App. at 293–94. This is exactly what happened here: the prosecutor argued Dr. Messer testified beyond a reasonable doubt that Mr. Brink was guilty, at once both arguing a fact not in evidence and also improperly bolstering Dr. Messer's credibility. The argument constituted misconduct.

As argued above, the misconduct prejudiced the outcome of the trial. Dr. Messer was the key witness to this case and presenting any unadmitted evidence on her behalf, as well as using unadmitted evidence to bolster her credibility, was damaging to Mr. Brink's right to a fair trial. Therefore, his conviction should be reversed.

Issue 2: Whether Mr. Brink was denied his Sixth Amendment right to effective assistance of counsel.

Under the Sixth Amendment, a criminal defendant has the right to effective assistance of counsel. *Strickland v. Washington*, 466 U.S. 668, 685–86, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). “A claim of ineffective assistance of counsel is an issue of constitutional magnitude that may be considered for the first time on appeal.” *State v. Kylo*, 166 Wn.2d 856, 862, 215 P.3d 177 (2009) (citation omitted). The claim is reviewed *de novo*. *State v. Sutherby*, 165 Wn.2d 870, 883, 204 P.3d 916 (2009).

To establish ineffective assistance of counsel, a defendant must prove the following two-prong test:

(1) [D]efense counsel’s representation was deficient, *i.e.*, it fell below an objective standard of reasonableness based on consideration of all the circumstances; and (2) defense counsel’s deficient representation prejudiced the defendant, *i.e.*, there is a reasonable probability that, except for counsel’s unprofessional errors, the result of the proceeding would have been different.

State v. McFarland, 127 Wn.2d 322, 334–35, 899 P.2d 1251 (1995)

(citing *State v. Thomas*, 109 Wn.2d 222, 225–26, 743 P.2d 816 (1987)).

Prejudice can also be established by showing that “‘counsel’s errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.’” *State v. Hicks*, 163 Wn.2d 477, 488, 181 P.3d 831 (2008) (quoting *Strickland*, 466 U.S at 687).

Tactical decisions made by counsel cannot serve as a basis for an ineffective assistance of counsel claim. *State v. Grier*, 171 Wn.2d 17, 33, 246 P.3d 1260 (2011).

a. Whether Mr. Brink was denied his Sixth Amendment right to effective assistance of counsel when defense counsel failed to object to expert witness Dr. Michelle Messer’s speculative and irrelevant testimony.

At trial, Dr. Messer speculated one reason an adult might intentionally burn a child could be due to a potty training mess made by the child. (RP 77). She testified:

One of the things I thought about it sometimes it’s difficult taking care of a two year old. I’ve had a few of those in my life, and they can be a challenge. You know, sometimes they poop at inappropriate moments or they get their hands

in the diaper, and it goes everywhere, and you have to clean that up, and people get mad.
I could see where somebody could be so mad they would take the kid and use scalding hot water to clean him up.
That would produce this. That's one way.
Do I know for sure what happened to do that? No, I don't.
I wasn't there, but that would be one way to cause this kind of a burn.

(RP 77). Defense counsel did not object to this testimony. (RP 77).

As acknowledged above, in order for Mr. Brink to establish defense counsel was ineffective for failing to object to this comment, Mr. Brink must show defense counsel's representation was deficient, and that this deficient representation was prejudicial. *See McFarland*, 127 Wn.2d at 334–35 (citing *Thomas*, 109 Wn.2d at 225–26).

Expert testimony must be relevant and helpful to the trier of fact to be admissible. *Stedman v. Cooper*, 172 Wn. App. 9, 16, 292 P.3d 764 (2012) (citation omitted). Expert testimony is admissible if “scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue” ER 702. Expert opinions which are conclusory or speculative and lack an adequate foundation will not be admitted. *Stedman*, 172 Wn. App. at 16 (citing *Miller v. Likins*, 109 Wn. App. 140, 148, 34 P.3d 835 (2001)). “When ruling on somewhat speculative testimony, the court should keep in mind

the danger that the jury may be overly impressed with a witness possessing the aura of an expert.” *Id.*

In two pertinent cases, the court upheld exclusions of testimony from plaintiffs' experts as speculative. *Cho v. City of Seattle*, 185 Wn. App. 10, 341 P.3d 309 (2014), *review denied*, 183 Wn.2d 1007, 349 P.3d 857 (2015), and *Miller v. Likins*, 109 Wn. App. 140, 34 P.3d 835 (2001). In *Cho*, experts opined (in declarations opposing summary judgment) that if the city had installed a pedestrian island, then the plaintiff would have waited to cross the street and, if the city had installed a traffic light, the drunk driver would have stopped at the light. 185 Wn. App. at 20. The court found a summary judgment dismissal was proper because the experts' declarations were highly speculative since they contained “only conclusory allegations” which were “unsupported by any supporting facts.” *Id.* at 13, 20. In *Miller*, the accident reconstructionist opined the defendant's car struck the plaintiff on the shoulder of the road and not the roadway. *Id.* at 148–49. However, the expert also admitted he did not have any physical evidence to demonstrate such, but had based his opinion on an eyewitness's account of the accident. *Id.* at 149. The appellate court affirmed the trial court's determination that such testimony was speculative and lacked an adequate factual basis. *Id.* 147–149.

Likewise, Dr. Messer’s testimony was speculative and lacked an adequate foundational basis when she opined on a possible motive for intentionally burning K.S.D. (RP 77). Her testimony as to why K.S.D. received the burns was based on no evidence other than pure speculation. Nothing in the record indicated that K.S.D. had been burned with scalding water because he had soiled himself. (RP 56–234). Dr. Messer had no knowledge with which to conjecture as to the reasons why K.S.D. may have been intentionally burned, save for her belief it could have happened because two-year-old children “can be a challenge.” (RP 77). This portion of the testimony was purely irrelevant and unhelpful to the jury. ER 702. Defense counsel should have objected. The objection would have been sustained as the testimony lacked any adequate foundational basis, was irrelevant and speculative. *Stedman*, 172 Wn. App. at 16; *Cho*, 185 Wn. App. at 13, 20; *Miller*, 109 Wn. App. at 147–149; ER 402; ER 702. No legitimate tactical reason exists to excuse defense counsel’s failure to object.

Moreover, even if the testimony had been relevant, an objection to the potty training testimony as unfairly prejudicial would have been sustained. “Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice” ER 403. *See also State v. Braham*, 67 Wn. App. 930, 937, 841 P.2d 785

(1992), *amended* (Jan. 4, 1993) (finding expert testimony unduly prejudicial and inadmissible when such testimony implies guilt based on characteristics of known sex offenders). Similar to *Braham*, Dr. Messer's testimony implied the guilt of Mr. Brink by testifying as to possible motives for scalding burns to a child's bottom. The evidence was more prejudicial than probative as it attempted to classify why a person would scald a child at this age without any independent factual basis to support the insinuation. An objection would have been sustained and defense counsel's failure to object was deficient representation; there was no tactical reason not to object.

Dr. Messer was the key witness in the State's case against Mr. Brink and her expert testimony alone was what defined whether the burns were accidentally or intentionally inflicted.⁶ (RP 72–77). No other testimony in the case was as damaging. (RP 56–234). The prosecution sought ways to bring out testimony about whether Mr. Brink was attempting to potty train K.S.D. and whether he was angry with any messes K.S.D. may have made. (RP 146–147, 228). Despite presenting no direct or circumstantial evidence this was the case, it appears the State

⁶ Although Ms. Brown testified she believed Mr. Brink intentionally burned K.S.D., such testimony also was predicated upon Ms. Brown's admission she had come to that conclusion after learning of everything else in the case. (RP 168). Furthermore, as argued below, Mr. Brink believes Ms. Brown's testimony regarding his guilt was improperly admitted.

was implying an underlying theme of potty training K.S.D. and Mr. Brink's potential focus on potty training as a means for a potential motive for intentionally scalding K.S.D. (RP 56–234)

Dr. Messer's conjecture that perhaps, in the course of caring for a toddler, a person might intentionally scald a child out of frustration or anger was prejudicial. (RP 77). This is especially true because the testimony came from an expert and the jury was more likely to be persuaded by her conjectures on why the burn would have been intentionally inflicted. *Stedman*, 172 Wn. App. at 16 (when ruling on whether testimony is speculative in nature, "the court should keep in mind the danger that the jury may be overly impressed with a witness possessing the aura of an expert"). The courtroom minutes reflect the jury deliberated for almost a full day on the charge, which suggests the jury may have struggled in reaching a verdict. (CP 158). The improperly admitted expert testimony was extremely prejudicial and there was no tactical reason for failure to object.

Defense counsel's performance was deficient and it affected the outcome of the trial. Mr. Brink's conviction should be reversed.

b. Whether Mr. Brink was denied his Sixth Amendment right to effective assistance of counsel when defense counsel failed to object to witness testimony expressing an opinion on the defendant's guilt.

Ms. Brown testified the relationship between K.S.D. and Mr. Brink seemed “great” after the incident, and thus it was difficult for her to believe the burn was intentionally inflicted. (RP 167). However, later on during redirect she was asked if her understanding of the situation had changed, to which she replied affirmatively, stating: “I believe now after listening to the experts and seeing, you know, the reports and everything that it was done on purpose.” (RP 168). Defense counsel did not object. (RP 168).

“A witness may not give, directly or by inference, an opinion on a defendant's guilt.” *State v. Smiley*, 195 Wn. App. 185, 379 P.3d 149 (2016). Improper opinion testimony on a defendant's guilt can be reversible error because it violates the defendant's constitutional right to a fair jury trial. *State v. Kirkman*, 159 Wn.2d 918, 927, 155 P.3d 125 (2007) (citation omitted). Such testimony is unfairly prejudicial because it invades the province of the jury. *State v. Demery*, 144 Wn.2d 753, 759, 30 P.3d 1278 (2001) (citations and quotations omitted).

To determine whether statements are impermissible testimony, the court considers the following factors: (1) the type of witness involved, (2) the specific nature of the testimony, (3) the nature of the charges, (4) the

type of defense, and (5) the other evidence before the trier of fact.

Demery, 144 Wn.2d at 759 (citation and quotations omitted). “Some areas, however, are clearly inappropriate for opinion testimony in criminal trials, including personal opinions, particularly expressions of personal belief, as to the defendant's guilt, the intent of the accused, or the veracity of witnesses.” *State v. Quaale*, 182 Wn.2d 191, 200, 340 P.3d 213 (2014).

In applying the *Demery* factors to this case, an objection to Ms. Brown’s testimony would have been sustained. First, Ms. Brown is K.S.D.’s mother, a witness whose testimony was highly influential because of her relationships not only with the defendant, but also K.S.D. (RP 142–168). To a jury, Ms. Brown’s testimony would be crucial in its search for answers as to whether the burns were intentionally or accidentally inflicted. Second, the testimony was extremely harmful to Mr. Brink’s case, as it was a mother’s direct opinion on whether the defendant had intentionally harmed her child. (RP 168). Third, Ms. Brown’s opinion on Mr. Brink’s guilt went straight to the heart of whether she believed him guilty of the charge in this case—second degree assault of a child. (RP 168; CP 1). Fourth, the defense theory of the case was that the burns were not intentionally inflicted—in direct contradiction to what Ms. Brown testified. (RP 168). And finally, the only evidence these burns were intentionally inflicted came from the opinion testimony of Dr.

Messer. (RP 56–96). No other evidence presented by the State showed any intent by Mr. Brink to intentionally burn K.S.D. (RP 56–185). The only exception here being Ms. Brown’s additional testimony that she believed the burns were intentionally inflicted after “listening to the experts” and “seeing . . . the reports.” (RP 168).

Defense counsel should have objected to the State’s question and Ms. Brown’s subsequent testimony. (RP 168). Failure to object resulted in the jury hearing Ms. Brown’s direct thoughts about whether Mr. Brink intentionally burned K.S.D. (*Id.*). The failure to object to such testimony was not tactical and fell below objective professional norms. Ms. Brown’s testimony was a direct comment on the quality of the evidence and was a direct opinion on Mr. Brink’s guilt, which invaded the province of the jury. *Demery*, 144 Wn.2d at 759.

The failure to object was prejudicial to the trial’s outcome. Apart from the expert opinion testimony from Dr. Messer, there was no other evidence Mr. Brink had intentionally burned K.S.D. Ms. Brown’s opinion that Mr. Brink had intentionally burned K.S.D. was prejudicial to the trial’s result, particularly because she is K.S.D.’s mother. Ms. Brown’s testimony also implied she may have seen additional evidence outside the trial unseen by the jury. (RP 168). Allowing Ms. Brown to give her

opinion as to Mr. Brink's guilt was a violation of his right to a fair jury trial. *See Kirkman*, 159 Wn.2d at 927.

Defense counsel was ineffective for failing to object to Ms. Brown's testimony and the deficient representation was prejudicial. Mr. Brink's conviction should be reversed.

c. Whether Mr. Brink was denied his Sixth Amendment right to effective assistance of counsel when defense counsel failed to object to the improper statements in the prosecutor's closing argument.

As argued previously in Issue 1 above, the State committed misconduct by stating Dr. Messer testified "beyond a reasonable doubt" K.S.D. was intentionally burned. (RP 259).

Defense counsel should have objected to these statements, and the failure to do so was not tactical. (RP 259). The statements improperly vouched for the witness's credibility, misstated and shifted the burden of proof, and argued facts not in evidence. *Ish*, 170 Wn.2d at 196 (vouching); *Lindsay*, 180 Wn.2d at 434 (shifting or misstating burden of proof); *Glasmann*, 175 Wn.2d at 704–06 (facts not in evidence). No legitimate tactical reason exists to excuse the failure to object.

Defense counsel's failure to object prejudiced the outcome of the trial. The jury undoubtedly placed heavy weight on Dr. Messer's testimony—she was the most important witness in the State's case against Mr. Brink. (RP 56-185). Dr. Messer's testimony was the crucial element

in the State's case as to whether the burns on K.S.D. were intentionally inflicted or accidental. (RP 56–96). No other testimony was as important to the State's case. (RP 57–185). The State's misconduct egregiously bolstered Dr. Messer's testimony, and the resulting prejudice cannot be ignored.

Mr. Brink's conviction should be reversed.

Issue 3: Whether the trial court abused its discretion by admitting photographs when their prejudicial effect outweighed their probative value.

“The decision of whether to admit photographs lies within the sound discretion of the trial court.” *State v. Finch*, 137 Wn.2d 792, 812, 975 P.2d 967 (1999) (citing *State v. Lord*, 117 Wn.2d 829, 870, 822 P.2d 177 (1991)). “[G]ruesome photographs are admissible if the trial court finds their probative value out weighs [sic] their prejudicial effect.” *Id.* at 871. For example, our Supreme Court determined photographs have probative value when used to explain or illustrate the testimony of a pathologist who performs an autopsy. *Lord*, 117 Wn.2d at 870–71 (citing *State v. Jones*, 95 Wn.2d 616, 628, 628 P.2d 472 (1981)).

The decision whether to admit photographs will not be reversed on appeal absent a showing of abuse of discretion. *Jones*, 95 Wn.2d at 628 (citation omitted). In *Jones*, the trial court properly exercised its discretion by choosing to admit some photographs while excluding others.

Id. at 628. The trial court allowed only five out of fifteen photographs to be admitted and shown to the jury. *Id.* Five of the photographs were admissible for the purpose of showing cause of death, but the trial court determined the other 10 photographs had no probative value and were just “gruesome and gory.” *Id.* The court of appeals held the trial court properly exercised its discretion to admit those photographs which were relevant and probative, and exclude those photographs which were overly prejudicial. *Id.*

A trial court's evidentiary ruling is an abuse of discretion only if it is “manifestly unreasonable or based upon untenable grounds or reasons.”

State v. Perez-Valdez, 172 Wn.2d 808, 815, 265 P.3d 853 (2011).

Erroneous admission of evidence is “not prejudicial unless, within reasonable probabilities, the outcome of the trial would have been

materially affected had the error not occurred.” *State v. Thomas*, 150 Wn.2d 821, 871, 83 P.3d 970 (2004) (citation and quotations omitted).

“The improper admission of evidence constitutes harmless error if the evidence is of minor significance in reference to the overall,

overwhelming evidence as a whole.” *Id.* (citation and quotations omitted).

Some of the photographs admitted at trial were overly prejudicial.

The State presented several photographs of the injuries to K.S.D.’s

bottom. (RP 65–70; Exhibits P19, P24, P25, P26). These photographs are

unpleasant and quite gruesome. (RP 65–70; Exhibits P19, P24, P25, P26). After Exhibit P19 was admitted at trial, defense counsel objected to admission of any further photographs, as Exhibit P19 was an all-inclusive picture of the exact same images found in Exhibits P24, P25, and P26. (RP 67–70; Exhibit P19). Because the three additional photographs (Exhibits P24, P25, & P26) had already been presented in Exhibit P19, there was no probative value in presenting those additional exhibits. While some of the photographs may have been necessary for Dr. Messer to use in explaining to the jury her theories, (RP 65–77), there was no probative reason why additional copies of the same photographs needed to be presented. As defense counsel argued at trial, these additional exhibits merely added to the “shock value” of what were already very upsetting pictures. (RP 67–68). The admission of the additional photographs was not probative but prejudicial. It was unreasonable for the trial court to admit additional copies of the same pictures into evidence.

Moreover, the admission of such evidence was not harmless. This case was based upon the credibility of witnesses and their testimony. Dr. Messer’s testimony and her opinion were the most important pieces of evidence against Mr. Brink. Her interpretation of the burn pattern on K.S.D. is the only evidence she used to opine Mr. Brink had intentionally burned K.S.D. (RP 65–77). The additional photographs of the burns

tipped the scale by offending the jury's senses and thus improperly appealing to their emotions. There was no legitimate reason to allow into evidence copies of the same photographs when the photographs were so gruesome and the evidence was so dependent upon the testimony of one witness. The trial court abused its discretion. Mr. Brink's conviction should be reversed.

Issue 4: Whether the cumulative errors in this case require reversal.

“It is well accepted that reversal may be required due to the cumulative effects of trial court errors, even if each error examined on its own would otherwise be considered harmless.” *State v. Lopez*, 95 Wn. App. 842, 857, 980 P.2d 224 (1999). “Analysis of this issue depends on the nature of the error. Constitutional error is harmless when the conviction is supported by overwhelming evidence.” *Id.* “Under this test, constitutional error requires reversal unless the reviewing court is convinced beyond a reasonable doubt that any reasonable jury would have reached the same result in absence of the error.” *Id.* “Nonconstitutional error requires reversal only if, within reasonable probabilities, it materially affected the outcome of the trial.” *Id.*

Should this Court determine one or more of the errors above are not prejudicial enough on their own to warrant reversal, the cumulative effect of the prejudicial errors in this case warrants reversal.

The prosecutor's misconduct by vouching for a key expert witness, misstating and shifting the burden of proof, and presenting facts in evidence during closing were harmful. Defense counsel did not adequately represent his client by allowing harmful and speculative testimony into trial by the only and crucial expert witness, allowing a victim's mother to testify as to her opinion on the defendant's guilt, and also failing to object to the prosecutorial misconduct in closing. Finally, the trial's court's erroneous admission of extraneous and overly prejudicial and gruesome photographs tipped the scale against Mr. Brink.

The evidence in this case relied upon the opinion of a single expert witness. (RP 56–96). Dr. Messer's testimony as to whether the burns on K.S.D. were intentional was the most important testimony to the prosecution. (RP 56–185). In fact, Dr. Messer's opinion was so influential it persuaded Ms. Brown to conclude Mr. Brink was guilty. (RP 168). Because Dr. Messer's testimony was vital to the prosecution's case and the issue of Mr. Brink's guilt, it was also imperative to make sure the testimony was properly presented, which failed to happen. The courtroom minutes reflect the jury deliberated for nearly a day, showing it is likely the jury struggled with reaching a decision. (CP 158).

Mr. Brink asserts the errors were constitutional in nature, and thus no reviewing court could be convinced beyond a reasonable doubt the

jury's verdict would have remained the same without the errors. *Lopez*, 95 Wn. App. at 857. If the court deems these errors nonconstitutional, however, the errors still require reversal as there is a reasonable probability the errors affected the outcome of the trial. *Id.*

The cumulative errors require reversal. Defense counsel and the prosecution failed to preserve a fair trial for Mr. Brink.

Issue 5: Whether the trial court erred in imposing a total term of confinement and community custody that exceeds the statutory maximum.

Sentencing errors may be raised for the first time on appeal. *See State v. Bahl*, 164 Wn.2d 739, 744, 193 P.3d 678 (2008) (stating that “[i]n the context of sentencing, established case law holds that illegal or erroneous sentences may be challenged for the first time on appeal.”). “The interpretation of provisions of the SRA [Sentencing Reform Act] involves questions of law that we review de novo.” *State v. Winborne*, 167 Wn. App. 320, 326, 273 P.3d 454 (2012) (citing *State v. Jacobs*, 154 Wn.2d 596, 600, 115 P.3d 281 (2005)).

In *In re Personal Restraint of Brooks*, our Supreme Court held that “when the trial court imposes an aggregate term of confinement and community custody that potentially exceeds the statutory maximum, it must include a notation clarifying that the total term of confinement and community custody actually served may not exceed the statutory

maximum.” *State v. Boyd*, 174 Wn.2d 470, 472, 275 P.3d 321 (2012) (citing *In re Personal Restraint of Brooks*, 166 Wn.2d 664, 674, 211 P.3d 1023 (2009)). Subsequent to *Brooks*, the following amendment to the SRA became effective:

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 9.94A.701(9).

In *Winborne*, the defendant was sentenced to 60 months of confinement and 12 months of community custody following his conviction of felony violation of a domestic violence no-contact order under RCW 26.50.110(5). *Winborne*, 167 Wn. App. at 322. The judgment and sentence included a *Brooks* notation: “the total terms of confinement and community custody must not exceed the statutory maximum sentence of 60 months.” *Id.* at 322–23; *see also Brooks*, 166 Wn.2d at 674.

On appeal, the defendant argued that because he was sentenced to the statutory maximum term of confinement of five years, RCW 9.94A.701(9) required the trial court to reduce his term of community custody to zero. *Id.* at 326. This Court agreed, holding that RCW 9.94A.701(9) no longer permits a sentencing court to make a *Brooks*

notation to ensure the validity of a sentence. *Id.* at 322, 327–31. This Court found that RCW 9.94A.701(9) plainly presents a three-step process for the sentencing court to follow: “impose the term of confinement, impose the term of community custody, then reduce the term of community custody if necessary[.]” *Id.* at 329. This Court then remanded the case for resentencing. *Id.* at 331.

Subsequently, in *Boyd*, our Supreme Court reached the same result when interpreting RCW 9.94A.701(9). *See Boyd*, 174 Wn.2d at 471–73. There, the defendant was sentenced to a term of confinement and a term of community custody that together exceeded the statutory maximum sentence for the crime. *Id.* at 471–72. The judgment and sentence included a *Brooks* notation. *Id.* at 471; *see also Brooks*, 166 Wn.2d at 674.

In reversing and remanding the case for resentencing, the *Boyd* Court held “[t]he trial court here erred in imposing a total term of confinement and community custody in excess of the statutory maximum, notwithstanding the *Brooks* notation.” *Id.* at 473. The Court reasoned that RCW 9.94A.701(9) required “the trial court . . . to reduce [the defendant’s] term of community custody to avoid a sentence in excess of the statutory maximum.” *Id.*

Here, Mr. Brink was convicted of second degree assault of a child. (CP 175–187; RP 281). This crime is a class B felony. RCW 9A.36.130(2). The statutory maximum for a class B felony is ten years, or 120 months. RCW 9A.20.021(1)(b). A community custody term of 18 months is authorized for second degree assault of a child. *See* RCW 9.94A.701(2) (authorizing eighteen months of community custody for an offender sentenced for a violent offense); RCW 9.94A.030(55)(ix) (listing second degree assault of a child as a “violent offense”).

The trial court sentenced Mr. Brink to 120 months of confinement and 18 months of community custody, which totals 138 months. (CP 179–180). Thus, the term of confinement and the term of community custody together exceed the 120 month statutory maximum for the crimes. *See* 9A.20.021(1)(c) (statutory maximum of 120 months for a class B felony). Though the trial court appeared to want to impose community custody in lieu of earned early release time, the *Brooks* notation on Mr. Brink’s judgment and sentence is no longer valid, and the trial court did not further explain its purpose on the judgment and sentence. *Winborne*, 167 Wn. App. at 322, 327–31; (RP 291; CP 179-180).

Pursuant to RCW 9.94A.701(9), this Court should remand the case to resentence Mr. Brink so that the combined terms of incarceration and community custody do not exceed 120 months. *See* RCW

9.94A.701(9); *Winborne*, 167 Wn. App. at 330 (reversal necessary when trial court exceeds its sentencing authority); *Boyd*, 174 Wn.2d at 471–73.

Issue 6: Whether this Court should refuse to impose costs on appeal.

Mr. Brink preemptively objects to any appellate costs should the State be the prevailing party on appeal, pursuant to the recommended practice in *State v. Sinclair*, 192 Wn. App. 380, 385–94, 367 P.3d 612 (2016), and pursuant to this Court’s General Court Order issued on June 10, 2016. Mr. Brink’s Report as to Continued Indigency, filed on the same day this opening brief was filed, is evidence of his inability to pay costs on appeal. The imposition of appellate costs would be inconsistent with those principles enumerated in *Blazina*. See *State v. Blazina*, 182 Wn.2d 827, 835–37, 344 P.3d 680 (2015).

In *Blazina*, our Supreme Court recognized the “problematic consequences” LFOs inflict on indigent criminal defendants. *Blazina*, 182 Wn.2d at 835–37. To confront these serious problems, this Court emphasized the importance of judicial discretion: “The trial court must decide to impose LFOs and must consider the defendant’s current or future ability to pay those LFOs based on the particular facts of the defendant’s case.” *Blazina*, 182 Wn.2d at 834. Only by conducting such a “case-by-case analysis” may courts “arrive at an LFO order appropriate to the individual defendant’s circumstances.” *Id.*

The *Blazina* Court addressed LFOs imposed by trial courts, but the “problematic consequences” are every bit as problematic with appellate costs. The appellate cost bill imposes a debt for losing an appeal, which then “become[s] part of the trial court judgment and sentence.” RCW 10.73.160(3); *see also* CP 183. Imposing thousands of dollars on an indigent appellant after an unsuccessful appeal results in the same compounded interest and retention of court jurisdiction. Appellate costs negatively impact indigent appellants’ ability to move on with their lives in precisely the same ways the *Blazina* court identified.

Although *Blazina* applied the trial court LFO statute, RCW 10.01.160, it would contradict and contravene its reasoning not to require the same particularized inquiry before imposing costs on appeal. Under RCW 10.73.160(3), appellate costs automatically become part of the judgment and sentence. To award such costs without determining ability to pay would circumvent the individualized judicial discretion that *Blazina* held was essential before including monetary obligations in the judgment and sentence. This is particularly true where, as here, the trial court imposed only mandatory costs. (RP 292; CP 182). Mr. Brink qualified for indigent appellate counsel upon filing the underlying notice of appeal (CP 211–213), and according to his Report as to Continued Indigency, he remains indigent at this time.

In addition, the prior rationale in *State v. Blank*, 131 Wn.2d 230, 930 P.2d 1213 (1997), has lost its footing in light of *Blazina*. The *Blank* court did not require inquiry into an indigent appellant’s ability to pay at the time costs are imposed because ability to pay would be considered at the time the State attempted to collect the costs. *Blank*, 131 Wn.2d at 244, 246, 252–53. But this time-of-enforcement rationale does not account for *Blazina*’s recognition that the accumulation of interest begins at the time costs are imposed, causing significant and enduring hardship. *Blazina*, 344 P.3d at 684; *see also* RCW 10.82.090(1) (“[F]inancial obligations imposed in a judgment shall bear interest from the date of the judgment until payment, at the rate applicable to civil judgments.”). Moreover, indigent persons do not qualify for court-appointed counsel at the time the State seeks to collect costs. RCW 10.73.160(4) (no provision for appointment of counsel); RCW 10.01.160(4) (same); *State v. Mahone*, 98 Wn. App. 342, 346–47, 989 P.2d 583 (1999) (holding that because motion for remission of LFOs is not appealable as matter of right, “Mahone cannot receive counsel at public expense”). Expecting indigent defendants to shield themselves from the State’s collection efforts or to petition for remission without the assistance of counsel is neither fair nor realistic. The *Blazina* Court also expressly rejected the State’s ripeness claim that

“the proper time to challenge the imposition of an LFO arises when the State seeks to collect.” *Blazina*, 182 Wn.2d at 832, n.1.

Furthermore, the *Blazina* court instructed *all* courts to “look to the comment in GR 34 for guidance.” *Blazina*, 182 Wn.2d at 838. That comment provides, “The adoption of this rule is rooted in the constitutional premise that *every level of court* has the inherent authority to waive payment of filing fees and surcharges on a case by case basis.” GR 34 cmt. (emphasis added). The *Blazina* court also suggested, “if someone does meet the GR 34[(a)(3)] standard for indigency, courts should seriously question that person’s ability to pay LFOs.” *Blazina*, 182 Wn.2d at 839. This Court receives orders of indigency “as a part of the record on review.” RAP 15.2(e). “The appellate court will give a party the benefits of an order of indigency throughout the review unless the trial court finds the party’s financial condition has improved to the extent that the party is no longer indigent.” RAP 15.2(f). This presumption of continued indigency, coupled with the GR 34(a)(3) standard, requires this Court to “seriously question” an indigent appellant’s ability to pay costs assessed in an appellate cost bill. *Blazina*, 182 Wn.2d at 839. Recently, the Court further stated “[a] person’s present inability to meet their own basic needs is not only relevant, but crucial to determining whether paying

LFOs would create a manifest hardship.” *City of Richland v. Wakefield*, 380 P.3d 459, 464 (Wash. 2016).

This Court has discretion to deny appellate costs. RCW 10.73.160(1) states the “supreme court . . . *may* require an adult . . . to pay appellate costs.” (Emphasis added.) “[T]he word ‘may’ has a permissive or discretionary meaning.” *Staats v. Brown*, 139 Wn.2d 757, 789, 991 P.2d 615 (2000). *Blank*, too, acknowledged appellate courts have discretion to deny the State’s requests for costs. *Blank*, 131 Wn.2d at 252–53.

In *Blazina*, our Supreme Court stated:

[W]hen determining a defendant's ability to pay . . . Courts should also look to the comment in court rule GR 34 for guidance. This rule allows a person to obtain a waiver of filing fees and surcharges on the basis of indigent status, and the comment to the rule lists ways that a person may prove indigent status. For example, under the rule, courts must find a person indigent if the person establishes that he or she receives assistance from a needs-based, means-tested assistance program, *such as Social Security* or food stamps . . . Although the ways to establish indigent status remain nonexhaustive . . . *if someone does meet the GR 34 standard for indigency, courts should seriously question that person's ability to pay LFOs.*

Blazina, 182 Wn.2d at 838–39 (internal citations omitted) (emphasis added).

Mr. Brink is incarcerated and was sentenced to 120 months. (CP 179). His Report as to Continued Indigency indicates Mr. Brink owns no

real or personal property of value, he has no current employment history, and he is approximately \$74,000 in debt for legal financial obligations and personal debt. He does not have the means to meet his basic needs, and it unlikely he will be able to for some time. (CP 179); *see Wakefield*, 380 P.3d at 464. The record demonstrates Mr. Brink does not have the ability to pay costs on appeal.

For these reasons, Mr. Brink respectfully requests that no costs on appeal be assigned to him in the event that the State substantially prevails on appeal.

F. CONCLUSION

The State committed misconduct by vouching for its expert witness during closing argument, misstating or shifting the burden of proof, and arguing facts not in evidence. Defense counsel was ineffective for failing to object to speculative expert testimony, failure to object to a witness's testimony that Mr. Brink was guilty, and failure to object to the State's improper comments in closing. Also, the trial court erred in admitting extraneous copies of gruesome photographs. Each of these errors prejudiced Mr. Brink's right to a fair trial. However, if these errors standing alone do not warrant a new trial, Mr. Brink respectfully asserts the errors had the cumulative effect of being prejudicial. Mr. Brink

respectfully requests this Court reverse and remand for a new trial his conviction for second degree assault of a child.

At a minimum, the case should be remanded for resentencing so the combined terms of incarceration and community custody do not exceed 120 months.

Finally, Mr. Brink objects to any appellate costs should the State prevail on appeal.

Respectfully submitted this 21st day of November, 2016.

/s/ Laura M. Chuang
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COURT OF APPEALS
DIVISION III
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON)
Plaintiff/Respondent) COA No. 34031-7-III
vs.)
JOSHUA W. BRINK)
Defendant/Appellant) PROOF OF SERVICE
_____)

I, Jill S. Reuter, of Nichols Law Firm, PLLC, assigned counsel for the Appellant herein, do hereby certify under penalty of perjury that on November 21, 2016, I deposited for first-class mailing with the U.S. Postal Service, postage prepaid, a true and correct copy of the Appellant's opening brief to:

Joshua Wade Brink, DOC #374088
Stafford Creek Corrections Center
191 Constantine Way
Aberdeen, WA 98520

Having obtained prior permission from the Spokane County Prosecutor's Office, I also served the Respondent State of Washington at SCPAAppeals@SpokaneCounty.org using Division III's e-service feature.

Dated this 21st day of November, 2016.

/s/ Jill S. Reuter
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