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Division III
State of Washington
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NO. 35062-2-III

COURT OF APPEALS
STATE OF WASHINGTON
DIVISION III

STATE OF WASHINGTON,

Plaintiff/Respondent,

V.

WILLIAM JOSEPH KRAMER,

Defendant/Appellant.

BRIEF OF APPELLANT

Dennis W. Morgan WSBA #5286
Attorney for Appellant
P.O. Box 1019
Republic, Washington 99166
(509) 775-0777

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ASSIGNMENTS OF ERROR

1. The trial court committed reversible error when it allowed child hearsay testimony from a former child's grandmother, mother and a forensic interviewer.

2. The child hearsay testimony amounted to bolstering of the former child's testimony and/or vouching of her credibility.

3. Lack of sidebars, speaking objections, sparring between counsel and argument in the presence of the jury denied William Joseph Kramer a fair trial.

4. The prosecuting attorney committed misconduct by questioning witnesses as to the credibility of other witnesses, disparaging defense counsel on a number of occasions, complementing a witness and eliciting an opinion on Mr. Kramer's guilt from another witness.

5. The trial court violated Const. art. IV, § 16 when commenting on Mr. Kramer's testimony from his prior trial and the testimony of the complaining witness during the prosecuting attorney's closing argument.

6. Cumulative error deprived Mr. Kramer of a fair trial under the Fourteenth Amendment to the United States Constitution and Const. art. I, § 3.

7. The trial court erred by imposing a second set of legal financial obligations (LFOs), including the \$200.00 filing fee and \$100.00 DNA fee.

ISSUES RELATING TO ASSIGNMENTS OF ERROR

1. Is RCW 9A.44.120, the child hearsay statute, meant to allow hearsay testimony when a complaining witness is now an adult?

2. Does allowing hearsay testimony concerning statements made by a complaining witness when she was eight (8) years old amount to bolstering and/or vouching when she is now twenty (20) years old and testifying at a retrial?

3. Does the law of the case doctrine have any application insofar as the facts and circumstances of Mr. Kramer's retrial is concerned?

4. Was Mr. Kramer denied a fair trial as guaranteed by the due process clause of the Fourteenth Amendment to the United States Constitution and Const. art. I, § 3 when:

- a. Child hearsay testimony was allowed in contravention of RCW 9A.44.120;
- b. Prosecutorial misconduct occurred;
- c. The trial court commented on testimony from the prior trial as to Mr. Kramer and the complaining witness; and
- d. There was a lack of sidebars, speaking objections occurred, counsel engaged in argument and sparring in the presence of the jury?

5. Did the trial court violate Const. art. IV, § 16?

6. Does cumulative error require reversal of Mr. Kramer's conviction?

7. Were LFOs properly imposed in the Judgment and Sentence?

STATEMENT OF THE CASE

An Information was filed on April 22, 2005 charging William Joseph Kramer with first degree child molestation. (CP 1)

The Information was amended on May 6, 2005 to provide notice that the potential penalty was life in prison without possibility of parole (LWOP).

A Second Amended Information was filed on January 17, 2006 expanding the charging period from March 1-29, 2005 to December 1, 2004 through March 22, 2005. (CP 3)

Mr. Kramer was found guilty following a jury trial. Judgment and Sentence was entered on March 7, 2006. Mr. Kramer filed a Notice of Appeal on that same date. (CP 321; CP 330)

The Court of Appeals reversed Mr. Kramer's conviction on a public trial issue. The Mandate was issued on July 7, 2015 and remanded to the trial court for further action. (CP 341)

Mr. Kramer reappeared in the trial court. Conditions of release were entered on August 11, 2015. Bail in the amount of \$100,000.00 was imposed. (CP 353)

The State filed a motion to adopt prior rulings from the first trial. The rulings dealt with an ER 404(b) motion; a child hearsay/competency hearing; and motions in limine. (CP 52; CP 67; CP 309; CP 312)

Defense counsel moved to exclude Mr. Kramer's prior conviction by motion filed December 5, 2016. The motion was denied. There had been a previous stipulation to the conviction on January 19, 2006. (CP 4; CP 316)

The trial court determined that since the prior rulings had not been initially appealed that they became the law of the case. Findings of Fact and Conclusions of Law were filed on November 15, 2018. (CP 317; Beck RP 31, ll. 15-22; RP 56, ll. 4-7; RP 56, l. 24 to RP 57, l. 1; RP 61, l. 17 to RP 62, l. 4)¹

The State filed a motion to deny Mr. Kramer's request to introduce counseling records. Defense counsel filed a memorandum in response to the State's motion to exclude the counseling records on December 22, 2016. Defense counsel also filed a motion to dismiss for late disclosure. (CP 29; CP 83; CP 295; Beck RP 16, l. 14 to RP 18, l. 3)

The trial court determined that the disclosures made by the complaining witness to the counselor were privileged. No Findings of Fact or Conclusions of Law were entered. (Beck RP 57, ll. 5-22; RP 62, ll. 5-18)

Mr. Kramer's retrial was initially scheduled to commence on October 10, 2015. Multiple time-for-trial waivers were entered. The trial finally commenced on January 4, 2017. (CP 358; CP 363; CP 364; CP 365; CP 368)

Based upon the trial court's rulings the jury heard testimony from Suzanne Frank, K.S.'s grandmother; Mary DeBoer, K.S.'s mother; Karen Winston, a forensic interviewer who conducted an interview of K.S. when she was nine years old; K.S., now twenty (20) years of age; and J.H., who was the complaining witness in Mr. Kramer's 1994 child molestation case. (RP 19, ll. 15-18; RP 67, ll. 9-15)

Ms. Frank, Ms. DeBoer and Ms. Winston described K.S. as:

- Intelligent, quiet and shy (RP 23, l. 21 to RP 24, l. 4);
- Mature for her age and bright (RP 107, ll. 2-7);

¹ References to the transcripts are to Betty Sitter unless otherwise noted.

- Having an age appropriate vocabulary (RP 142, ll. 4-6);
- Having no impairments to her cognitive ability or her ability to communicate (RP 128, ll. 8-25).

K.S. made her initial disclosure to her grandmother. Her grandmother described her as being upset and wringing her hands. (RP 27, ll. 2-6)

K.S. told her grandmother that Mr. Kramer did icky things to her. This included touching her butt; lying on top of her and moving against her skin; and touching her private parts. (RP 29, ll. 6-10; ll. 13-19; RP 30, ll. 2-5)

Ms. Franks' testimony was more elaborate than at the original trial. It also differed from her March 22, 2005 written statement. On cross-examination Ms. Franks stated that no one had asked her about these specifics:

- Whether the bedroom door was closed;
- Whether Mr. Kramer laid on top of K.S.; or
- Whether they were laying on the bed.

(RP 42, ll. 5-14; RP 46, ll. 11-21; RP 47, ll. 2-4)

K.S.'s mother also embellished her testimony from one trial to the next. She now added that K.S. had told her that Mr. Kramer rubbed his own privates at the same time as he was rubbing her privates. Mr. Kramer held her arm so she could not get away. (RP 104, ll. 16-23)

Ms. DeBoer also wrote a statement in 2005. Ms. DeBoer claimed she wrote it based upon directions from law enforcement. The information about Mr. Kramer allegedly touching himself was not included in that statement. She claimed it was not in the statement because no one ever asked her about it. She later stated that she wrote the statement

on her own and not in response to questions. (RP 176, ll. 7-10; ll. 15-24; RP 182, ll. 2-14; RP 191, ll. 6-13)

K.S. also augmented her testimony from one trial to the next.

On January 19, 2006 she was nine (9) years old. She stated that Mr. Kramer touched her “in ways not right.” The touching was on her privates and occurred approximately ten (10) times. (RP 25, ll. 22-23; RP 29, ll. 2-10; ll. 18-23; RP 31, ll. 3-7)

The touching occurred both on top of her clothes and under her clothes. It occurred in both the living room and Mr. Kramer’s bedroom. (RP 32, ll. 20-24; RP 40, l. 22 to RP 41, l. 1)

K.S.’s January 5, 2017 testimony, in addition to the touching, indicated that Mr. Kramer took her into his bedroom alone and rubbed up against her. He had her take off her clothes and he would either “jack off” or rub against her “until he came.” (RP 229, l. 13 to RP 230, l. 1)

K.S. claimed that the last time it occurred he had locked the bedroom door after she went into the bedroom. (RP 232, l. 20 to RP 233, l. 3)

K.S. earlier testified that she was only in Mr. Kramer’s bedroom on one (1) or two (2) occasions and her brothers were with her both times. (RP 227, ll. 16-22)

K.S. stated she lacked sufficient vocabulary in 2006 to describe everything that occurred. (RP 236, ll. 1-8)

K.S. supplied the following reasons for the additions to her testimony by claiming she lacked the vocabulary to explain things in the prior trial, pointing to her former testimony, and claiming that “I was vague” in her Skype interview with defense counsel. (RP 269, l. 19 to RP 272, l. 17)

K.S. did admit, on cross-examination, that she did not tell anyone about Mr. Kramer having her remove her clothes. She explained that she was not asked. She also admitted that she had never told anyone about Mr. Kramer ejaculating or being locked in his room for two (2) hours. (RP 292, l. 19 to RP 293, l. 2; RP 293, ll. 7-13)

In response to questions from the prosecuting attorney during redirect K.S. commented upon Mr. Kramer's guilt. There was also a discussion concerning the accuracy of Ms. Winston's report and its contents. There was an objection to that testimony. (RP 297, ll. 13-15; RP 302, l. 19 to RP 303, l. 20)

Karen Winston conducted her forensic interview of K.S. on April 12, 2005. There was no video or audio equipment at that time. She created her report from her notes. There was no necessity for rapport building. K.S. immediately stated that "boys are gross." She provided information at once concerning what Mr. Kramer was alleged to have done to her. (RP 119, ll. 19-21; RP 124, ll. 19-21; RP 128, ll. 20-25; RP 129, ll. 1-8)

Ms. Winston was allowed to testify concerning her observations of whether or not K.S. showed indications of fabrication. Defense counsel objected to the testimony. (RP 141, ll. 1-19; Appendix "A")

J.H., who was identified as the complaining witness in Mr. Kramer's 1994 conviction, provided background information surrounding those events. An ER 404(b) hearing had been held prior to the first trial. The trial court adopted those findings for the second trial. (Sitter RP 194, ll. 9-19; CP 312)

J.H. indicated that Mr. Kramer would put his hand down her pants and play with her vaginal area. The touching occurred both on top and under her clothes. Mr. Kramer pled guilty to that offense. (RP 199, ll. 6-13; RP 202, l. 24 to RP 203, l. 1; RP 204, ll. 1-3)

A photo of J.H. when she was seven (7) years old was admitted over defense counsel's objection. (Exhibit 11; RP 359, l. 17 to RP 360, l. 20)

Dr. Hendrickson, a pediatrician who examined K.S. in 2005, described her as a "bright, pretty, confident child [who] didn't come very super anxious to the examination. She was able to converse and express herself very normally for an eight-year-old girl." (RP 328, ll. 18-23; RP 335, ll. 9-10; RP 338, ll. 4-9)

Mr. Kramer testified at both trials. The prosecuting attorney, during cross-examination, commented on Mr. Kramer's truthfulness over objection. Defense counsel objected to the prosecuting attorney's phrasing of certain questions and the trial court commented on Mr. Kramer's 2006 testimony. (RP 459, ll. 15-25; RP 460, ll. 1-12; RP 461, l. 24 to RP 462, l. 6)

The following excerpts reflect what occurred:

Q. [By Mr. Martin] You admitted in your trial that you were alone in your bedroom with K.S. on one occasion?

A. Yes.

Q. And on that occasion you were playing a video game with her in your room?

A. Yes.

Q. Your sister, Lisa, caught you in there?

MR. HERREAN: Objection, that phrase is so prejudicial.

(RP 459, ll. 15-24)

Q. [By Mr. Martin] Your sister, Lisa, discovered you in there along with K.S.?

MR. HERREAN: Objection, it's like something was wrong.

JUDGE STROHMAIER: **I believe discovery applies,** go ahead.

MR. HERREAN: Judge, I don't think he can testify to what his sister did. She's passed now so she can't testify what she saw and what she discovered.

MR. MARTIN: **If he believes his client is telling the truth.**

(RP 460, ll. 1-12) (Emphasis supplied.)

Q. You also got in trouble with Mary for giving her children too much ice cream and candy; isn't that true?

MR. HERREAN: Objection, gets in trouble, and I don't think there has been any testimony.

JUDGE STROHMAIER: **Those are the words he used back in 2006?** Let him testify first, on impeachment you can go into that afterwards. You're putting the cart before the horse.

(RP 461, l. 24 to RP 462, l. 6) (Emphasis supplied.)

After the jury determined that Mr. Kramer was guilty defense counsel filed a motion to arrest judgment and for a new trial. The motions were denied. (CP 119; CP 120)

Judgment and Sentence was entered on February 3, 2017. (CP 169)

Mr. Kramer filed his Notice of Appeal on February 8, 2017 and an Order of Indigency was entered. (CP 184; CP 188)

SUMMARY OF ARGUMENT

RCW 9A.44.120 is meant as an aid to enable the State to have an improved opportunity of convicting an individual when the complaining witness is a child under ten (10) years of age. It requires a determination of the child's competency and reliability.

The statute does not apply to an adult witness. When a child reaches adulthood, or is over ten (10) years of age, the State does not get the benefit of bolstering the child's testimony.

The admission of child hearsay in Mr. Kramer's case denied him a fair trial under the due process clauses of the Fourteenth Amendment and Const. art. I, § 3.

The law of the case doctrine has no application under the facts and circumstances of Mr. Kramer's case. The testimony of Suzanne Franks, Mary DeBoer and Karen Winston was so highly prejudicial that it turned a she said/he said case into a debacle that undermined the entire trial.

In addition, multiple other errors, coupled with the misuse of RCW 9A.44.120, compounded the due process violation.

The trial court erroneously imposed what are now discretionary LFOs.

ARGUMENT

I. CHILD HEARSAY

RCW 9A.44.120 states, in part:

A statement made by **a child under the age of ten** describing any act of sexual contact performed with or on the child by another ... not otherwise admissible by statute or court rule, is admissible in evidence in ... criminal proceedings, in the courts of the state of Washington if:

- (1) The court finds, in a hearing conducted outside the presence of the jury, that the time, content, and circumstances of the statement provide sufficient indicia of reliability; and
- (2) **The child** either:
 - (a) Testifies at the proceedings; or
 - (b) Is unavailable as a witness: **PROVIDED**, That when **the child** is unavailable as a witness, such statement may be admitted only if there is corroborative evidence of the act.

...

(Emphasis supplied.)

Mr. Kramer contends that there is no ambiguity in the statute. It applies to a child. It does not apply to an adult who gave a statement as a child.

In order for a child's statement to be admissible under the statute the child must either testify, or, alternatively, if the child is unavailable, there must be corroborative evidence.

K.S. was eight (8) years old when she made disclosures to her grandmother, mother, and a forensic interviewer.

K.S. was nine (9) years old at the time of Mr. Kramer's first trial.

A child hearsay hearing was conducted prior to the first trial. K.S.'s statements were determined admissible.

At the time of the second trial K.S. was twenty (20) years old. The State argued, and the trial court agreed, that the law of the case doctrine applied to the prior court ruling concerning admissibility of K.S.'s statements. The law of the case doctrine has no application under the facts and circumstances of Mr. Kramer's second case.

The purpose behind RCW 9A.44.120 is set forth in *State v. Jones*, 112 Wn.2d 488, 493-94, 772 P.2d 496 (1989):

RCW 9A.44.120 is principally directed at alleviating the difficult problems of proof that often frustrate prosecutions for child sexual abuse. Acts of abuse generally occur in private and in many cases leave no physical evidence. Thus, prosecutors must rely on the testimony of the child victim to make their cases. **Children are often ineffective witnesses, however.** Feeling intimidated and confused by courtroom processes, embarrassed at having to describe sexual matters, and uncomfortable in their role as accuser of the defendant who may be a parent, other relative or friend, **children** often are unable or unwilling to account the abuses committed on them. In addition, **children's** memories of abuse may have dimmed with the passage of time. For these reasons, the admissibility of statements **children** made outside the courtroom, and especially statements made close in time to the acts of abuse they described, is crucial to the successful prosecution of many child sex offenses.

See also Joint Hearings on SB 4461 before the Washington State Senate Judiciary Comm. and Washington State House Ethics, Law & Justice Comm. 47th Legislature (Jan. 28, 1982).

(Emphasis supplied.)

Again, the statute is aimed at the problems potentially existing in connection with the testimony of child witnesses who have suffered either sexual abuse or physical abuse. It is not aimed at an adult witness who suffered the abuse as a child.

The testimony presented by K.S.'s grandmother, K.S.'s mother, and the forensic interviewer at the second trial amounted to nothing more than the bolstering of K.S.'s own testimony. It was unnecessary and unduly prejudicial.

Child hearsay is admissible where the child is available and competent to testify. ... The statute alleviates difficult proof problems that often frustrate prosecution in child sex abuse cases. [Citations omitted.]

The statements are nonetheless subject to ER 403. It permits exclusion of evidence if the probative value is substantially outweighed by the danger of prejudice from needless presentation of cumulative evidence. *Bedker* [*State v. Bedker*, 74 Wn. App. 87, 871 P.2d 673 (1994)] at 93; *see also State v. Rice*, 48 Wn. App. 7, 12-13, 737 P.2d 726 (1987); *State v. Ammlung*, 31 Wn. App. 696, 700, 644 P.2d 717 (1982). ...

State v. Dunn, 125 Wn. App. 582, 588, 105 P.3d 1022 (2005).

Mr. Kramer further points out that the testimony of K.S.'s grandmother and mother differed significantly between the two (2) trials.

Suzanne Frank, K.S.'s grandmother, testified as follows:

01/19/2006

01/04/2017

K.S. said "Bill" is a guy and he rubs my privates. (RP 70, ll. 10-16; RP 72, ll. 1-5) K.S. demonstrated where "Bill" touched her both on the front and on the back. (RP 73, ll. 2-21)

K.S. said that every time she was at "Bill's" it occurred. (RP 75, ll. 18-23)

K.S. said that "Bill" touched her butt and that it occurred in the bedroom with the door locked. He was laying on top of her. (RP 29, ll. 9-19)

"Bill" was touching his own privates but Ms. Frank's never told anyone because she wasn't asked and did not write it in

her prior statement. (RP 176, ll. 3-24; RP 182, ll. 15-19)

Mary Snell (now DeBoer), K.S.'s mother, also elaborated on her prior testimony:

01/19/2006

“Bill” touched K.S.’s privates both on top and under her clothes. (RP 87, ll. 19-25)

01/05/2017

“Bill” touched K.S.’s privates and hurt her. (RP 103, ll. 9-10)

“Bill” touched her on top and under her clothes both on her butt and on the front.

He was rubbing her. (RP 104, ll. 15-18)

“Bill” also rubbed her chest. (RP 104, ll. 19-20)

“Bill” would rub his own privates and would hold her arms so she couldn’t get away. (RP 104, ll. 20-23)

K.S. was locked in “Bill’s” room for about two hours. (RP 232, l. 20 to RP 233, l. 3)

Karen Winston, the forensic interviewer, did not testify at the first trial. She did testify at the second trial and her report was read into the record; but not made an exhibit. (CP 72)

Ms. Winston’s testimony will be discussed in more detail later in this brief.

In the absence of the testimony of Ms. Franks, Ms. DeBoer, and Ms. Winston the case would have amounted to a she said/he said matter.

There was no physical evidence.

There were no independent witnesses to the events.

II. LAW OF THE CASE

Mr. Kramer appealed the guilty verdict in his first trial. The Court of Appeals reversed his conviction based upon a violation of the public trial right. (CP 341)

Mr. Kramer did not raise a challenge to the Findings of Fact and Conclusions of Law concerning the admissibility of child hearsay during his first appeal.

Mr. Kramer now challenges the admissibility of the child hearsay based upon his argument, *supra*; and the fact that the law of the case doctrine is inapplicable under the facts and circumstances of his case.

An appellate court's decision "governs all subsequent proceedings in the action in any court" once the appellate court issues a mandate "unless otherwise directed upon recall of the mandate ..., and except as provided in Rule 2.5(c)(2)." RAP 12.2.

Hough v. Stockbridge, 152 Wn. App. 328, 337, 216 P.3d 1077 (2009).

Since his prior conviction was overturned, and a retrial ordered, the question becomes whether or not the passage of time precludes applying the law of the case doctrine. In Mr. Kramer's situation K.S. is no longer a child. Thus, the child hearsay statute should be deemed inapplicable.

... [T]he law of the case doctrine ... "... provides where there has been a determination of applicable law in a prior appeal, the law of the case doctrine ordinarily precludes an appeal of the same legal issues." *Roberson v. Perez*, 119 Wn. App. 928, 931, 83 P.3d 1026 (2004) ... [F]urther, this court has authority to reach any issue necessary to adjust disposition. *Alderado v. Wash. Pub. Power Supply Sys.*, 111 Wn.2d 424, 429, 759 P.2d 427 (1988) (citing *Siegler v. Kuhlman*, 81 Wn.2d 448, 502 P.2d 1181 (1972)).

State v. Slert, 186 Wn.2d 869, 879-80, 383 P.3d 466 (2016).

The prior appeal did not involve a challenge to the admissibility of child hearsay. Thus, Mr. Kramer is neither collaterally estopped from raising the issue at this time nor is it res judicata.

Moreover, a just disposition of the current appeal requires that this particular issue be addressed. It is of critical importance not only to Mr. Kramer; but to the trial courts and attorneys of this state.

The *Hough* case is distinguishable since it did involve an issue that had been decided on a prior appeal. It is cited merely as a reference to introduce the law of the case.

The State's argument that the law of the case applied to the previous Findings of Fact and Conclusions of Law is error. The trial court compounded the error by accepting that argument. The error now needs to be corrected.

... [A]n evidentiary ruling is not a final judgment. *State v. Kinard*, 39 Wn. App. 871, 873, 696 P.2d 603 (1985).

... The improper admission of evidence is reversible error solely if it results in prejudice. *State v. Vreen*, 99 Wn. App. 662, 671, 994 P.2d 905 (2000), *aff'd*, 143 Wn.2d 923, 26 P.3d 236 (2001). An evidentiary error is prejudicial if a reasonable probability exists that it materially affected the outcome of the trial. *Id.* No prejudice exists if the inadmissible evidence is "of minor significance in reference to the overall, overwhelming evidence as a whole." *State v. Bourgeois*, 133 Wn.2d 389, 403, 945 P.2d 1120 (1997).

State v. Nelson, 108 Wn. App. 918, 926, 33 P.3d 419 (2001).

The admission of child hearsay in Mr. Kramer's second trial is reversible error. It resulted in prejudice. It was a she said/he said case with no independent corroborating evidence other than the child hearsay.

The evidence was not overwhelming. The bolstering of K.S.’s testimony was significant. The prejudice to Mr. Kramer cannot be ignored.

The exclusion of the child hearsay does not deprive the State of presenting evidence of K.S.’s complaint to her grandmother.

In criminal trials involving sex offenses, the prosecution may present evidence that the victim complained to someone after the assault. *State v. Ferguson*, 100 Wn.2d 131, 135, 667 P.2d 68 (1983); *State v. Murley*, 35 Wn.2d 233, 237, 212 P.2d 801 (1949). However, this narrow exception allows only evidence establishing that a complaint was timely made. Evidence of the details of the complaint, including the identity of the offender and the specifics of the act, is not admissible. *Ferguson*, 100 Wn.2d at 135-36.

State v. Alexander, 64 Wn. App. 147, 151, 822 P.2d 1250 (1992).

At the common law the disclosure was known as either the “hue and cry doctrine” or the “fact-of complaint rule.”

As recognized in COURTROOM HANDBOOK ON WASHINGTON EVIDENCE, KARL B. TEGLAND (2018-2019 ed.) in § 807:8:

In child abuse prosecutions, when the child’s out-of-court statements do not fit within the hearsay exceptions defined by ER 803 or the statutory exception for certain reports of sexual abuse . . . , the State may seek to invoke a common law hearsay exception known as the fact-of-complaint rule. Under the common law rule, only the fact of a timely complaint is admissible. The identity of the offender is inadmissible, as are additional details regarding the incident. [Citation omitted.]

In Washington, the courts continue to recognize this uncodified exception to the hearsay rule.

III. SPEAKING OBJECTIONS AND SIDEBARS

ER 102 provides:

These rules shall be construed to secure fairness in administration, elimination of unjustifiable expense and delay, and promotion of growth and development of the law of evidence to learn that the truth may be ascertained and proceedings justly determined.

ER 103(c) provides:

Hearing of Jury. In jury cases, proceedings shall be conducted, to the extent practicable, so as to prevent inadmissible evidence from being suggested to the jury by any means, such as making statements or offers of proof or asking questions in the hearing of the jury.

Speaking objections are neither authorized nor prohibited by the Evidence Rules. The rules leave it to the individual trial judge to decide the propriety of a speaking objection. As a practical matter, most trial judges believe speaking objections should be used sparingly, if at all. Most trial judges prefer that attorneys phrase objections in terms of the applicable rule of evidence

COURTROOM HANDBOOK ON WASHINGTON EVIDENCE, KARL B. TEGLAND (2018-2019 ed.),
p. 111

A speaking objection is

[a]n objection that contains more information (often in the form of argument) than needed by the judge to sustain or overrule it. Many judges prohibit lawyers from using speaking objections, and sometimes even from stating the grounds for objections, because of the potential for influencing the jury.

BLACK'S LAW DICTIONARY (9th ed.)

A sidebar conference is “a discussion among the judge and counsel, usually over an evidentiary objection, outside the jury’s hearing.” BLACK’S LAW DICTIONARY (9th ed.)

Mr. Kramer asserts the following excerpts set out improper speaking objections that should have occurred in sidebars:

Q. [By Mr. Hearrean] [K.S.], when you were admitted to the Wyoming Behavioral Institute for suicide that you testified to, when you were in counselling, did you report to the counselor that when you lived in Ford, Washington, which was about the same time frame --

MR. MARTIN: Objection. Now he's getting into privilege that was talked about before, so it's one thing to talk about an allegation but it's another thing when she is talking in her own counselling sessions about what they were talking about, the allegation from CPS.

MR. HEARREAN: Judge, we already addressed all of this.

JUDGE STROHMAIER: Now, the issue I ruled on counselling that is hers. Now, allegations as to the time that related to CPS, if they are in fact the disclosure report that needed to be followed from her. Now, if we have something else from CPS worker who wrote the report? We have a case worker --

MR. MARTIN: Judge, the only reason CPS had this case is they were mandatory *[sic]* reporters and that is admissible. Judge, I know there has been a report. I guess with that I think it is terribly proper to ask about it but not proper to ask about counseling.

JUDGE STROHMAIER: Right.

MR. HEARREAN: Judge, I'm asking the questions that I thought we agreed from the report that we already had the discussion about. They covered it already, he's covered it, Judge.

MR. MARTIN: Judge, I covered the fact, I didn't cover any of the discussion with a counselor. I covered the fact of her attempt and I covered the fact of the CPS allegation if he wants to talk about that, that is totally proper, otherwise he is violating counselling privelege [*sic*].

(RP 255, l. 3 to RP 256, l. 11)

Q. How much did she have to drink before you had this one night stand, if you know?

MR. MARTIN: Objection, relevance.

JUDGE STROHMAIER: I have to sustain that. I don't know if that's relevant.

MR. HEARREAN: I feel uncomfortable telling the relevance to the jury. I don't want to do that, Judge. She was intoxicated.

JUDGE STROHMAIER: Whether she was or not, is that relevant to the charge?

MR. MARTIN: And, Judge, we had extensive pretrial hearings on 404(a) and 404(b) and none of this was brought up.

MR. HEARREAN: That's impeachment, Judge, she already testified that she didn't go to the bar.

JUDGE STROHMAIER: I'll sustain it.

(RP 358, ll. 8-23)

MR. MARTIN: Judge, I move to admit State's No. 11.

JUDGE STROHMAIER: Any objection?

MR. HEARREAN: Yes, I would object because that has nothing to do with this case, Judge, and this shows an emphasis on another case, and we had a jury instruction on that, Judge, and it is not this case.

MR. MARTIN: Judge, the entire reason for it is the common scheme and plan.

JUDGE STROHMAIER: I'm going to allow it. Admitted.

(RP 360, ll. 10-20)

Q. And you also testified that you had no idea as to what was going on, that your friend, Bill Kramer was molesting your sister?

MR. HEARREAN: Objection, this is not this case.

MR. MARTIN: He before asked about his observations with regard to what was going on, so his ability to perceive is relevant.

MR. HEARREAN: It is prejudice and going to another case. That is totally against 404(b) and is prejudicial.

MR. MARTIN: I'm not trying to prove anything about Mr. Kramer right now, I'm talking about Mr. Carvalho's perceptions.

JUDGE STROHMAIER: His perception on the trial is relevant?

MR. MARTIN: I think it was relevant if he was not aware that his sister was being molested, his awareness of whether [K.S.] was called into question.

MR. HEARREAN: Objection to this being argued in front of a jury about his theory of the case.

MR. MARTIN: I have no objection if the Court wants to pause and reread that limiting instruction and I will resume.

MR. HEARREAN: This trial is about Mr. Kramer and this charge and not what happened 25 years ago.

JUDGE STROHMAIER: The question is about his ability to recall or his ability to perceive, so as long as it's limited to what that question of the purpose is for, limited to recollection; is that correct?

MR. MARTIN: That's correct.

JUDGE STROHMAIER: Go ahead.

(RP 363, l. 3 to RP 364, l. 9)

A. I don't feel like I'm going to turn into a puddle on the floor, but I want everybody in here to understand how important that it is, and I need everybody to clearly understand the type of person he is.

MR. HEARREAN: Objection, Judge.

MR. MARTIN: I'll ask a different question, Judge.

Q. [By Mr. Martin] In the time since Mr. Kramer molested you, have there been ripple affects [*sic*] on your life from this?

A. Yes.

Q. Can you go into that a little bit, what sort of ripple effects have you had?

MR. HEARREAN: Object to that. The determination that we are having today, Your Honor, is the guilt and innocence of Mr. Kramer, not what has happened to her for whatever reason. Your Honor, if we get into all that it is getting out of the core of this.

JUDGE STROHMAIER: Well, it depends on what is going to be asked and cross too.

MR. MARTIN: I'm not going to ask her for things that happened in her life since then, but it goes to credibility.

JUDGE STROHMAIER: You'll have some leeway here, but don't go too far.

Go ahead.

Q. [By Mr. Martin] You heard Counsel's objection and my response to the Court, but in a focused way, what are some of the ripple effects that happened to you as a result of what Mr. Kramer did?

A. A lot of mistrust from male figures, I've had nightmares and sleepless nights. Do I need to continue?

Q. Well, did there ever come a time when you tried to hurt yourself?

MR. HEARREAN: Objection, this is so prejudicial. It has nothing to do with the facts of the case and it is prejudicial. I object.

JUDGE STROHMAIER: Objection noted, but I think it is proper at this time.

(RP 242, l. 2 to RP 243, l. 14)

The overall impact of not using sidebars and allowing speaking objections resulted in the jury learning about information that was excluded pre-trial, hearing attorney opinions on credibility, creating an impression on matters not relevant to the issues involved and detracting from acceptable trial procedures.

IV. VOUCHING/BOLSTERING

A witness's expression of personal belief about the veracity of another witness is inappropriate opinion testimony in criminal trials. *State v. Montgomery*, 163 Wn.2d 577, 591, 183 P.3d 267 (2008). Admission of such testimony may be reversible error. *State v. Demery*, 144 Wn.2d 753, 759, 30 P.3d 1278 (2001).

State v. Perez-Valdez, 172 Wn.2d 808, 817, 265 P.3d 853 (2011).

Particularly, by allowing Ms. Winston to indicate that she did not observe any basis to determine if K.S. was fabricating her statements placed an imprimatur upon the validity of those statements.

Mary DeBoer - re: K. S.

Q. [By Mr. Martin] Are you aware of any, any circumstances that would have led your daughter to want some kind of vengeance against the Kramer family, or some basis for her making this story up?

A. No.

(RP 168, ll. 1-5)

K.S. - re: defendant

Q. When Mr. Herrean asked you if you want to get Mr. Kramer, do you want him to be convicted of this crime if he is not guilty of it?

A. No, if he is not guilty of it we wouldn't be here.

(RP 297, ll. 13-15)

Gary Carvalho - re: J.H.

Q. [By Mr. Martin] Do you believe that your sister was telling the truth?

A. At that time, yes.

(RP 364, ll. 24-25)

Frances Machen - re: K.S.

Q. [By Mr. Martin] You believe that [K.S.] was lying in those accusations; is that true?

A, Yes.

(RP 431, ll. 1-3)

When the vouching/bolstering which occurred is considered in its totality Mr. Kramer contends that his constitutional right to a fair trial was violated.

Improper opinion testimony violates the defendant's right to a jury trial and invades the fact-finding province of the jury. *State v. Dolan*, 118 Wn. App. 323, 329, 73 P.3d 1011 (2003). A witness is not allowed to give an opinion on another witness's credibility. *State v. Carlson*, 80 Wn. App. 116, 123, 906 P.2d 999 (1995). Because improper opinion testimony violates a constitutional right, a defendant may generally raise the issue for the first time on appeal. *State v. Saunders*, 120 Wn. App. 800, 811, 86 P.3d 232 (2004). ...

State v. Binh Thach, 126 Wn. App. 297, 312, 106 P.3d 782 (2005).

Ms. Winston's testimony, as an expert forensic interviewer, placed undue emphasis upon K.S.'s disclosure being truthful. When considered in light of the limitations to the child hearsay statute, and the previously undisclosed testimony from Ms. Franks, Ms. DeBoer, and K.S., the prejudice to Mr. Kramer is evident.

An expert's opinion on an ultimate issue of fact that is "based solely on the expert's perception of the witness' truthfulness" is unfairly prejudicial and thus inadmissible because it takes an ultimate issue of fact from the jurors. [Citations omitted.]

... [T]he admission of such testimony is constitutional error. [Citation omitted.] Any error that infringes on a constitutional right is presumed prejudicial. And the State must show that the error was harmless beyond a reasonable doubt. *State v. Miller*, 131 Wn.2d 78, 90, 929 P.2d 372 (1997). The error is harmless if there is overwhelming untainted evidence

that the jury would have reached the same result without the erroneous introduction of evidence. *State v. Guloy*, 104 Wn.2d 412, 426, 705 P.2d 1182 (1985).

State v. Dunn, supra, 592-93.

The error in Mr. Kramer's case is not harmless. This, as previously indicated, is a she said/he said case.

In the absence of physical evidence, eyewitness testimony, or other corroborating evidence there was a paucity of proof of guilt. *See: State v. Dunn, supra*, 594, *citing United States v. Azure*, 801 F.2d 336, 339 (8th Cir. 1986):

No reliable test for truthfulness exists and [the pediatrician] was not qualified to judge the truthfulness of that part of [the child's] story. The jury may well have relied on his opinion and "surrender[ed] their own commonsense in weighing testimony"

Id. at 341 (*quoting United States v. Barnard*, 490 F.2d 907, 912 (9th Cir. 1973)).

Admission of witness opinion testimony on an ultimate fact, without objection, is not automatically reviewable as a "manifest" constitutional error. "Manifest error" requires a nearly explicit statement by the witness that the witness believed the accusing victim. Requiring an explicit or almost explicit witness statement on an ultimate issue of fact is consistent with precedent holding the manifest error exception is narrow. [Citation omitted.]

Requiring an explicit or almost explicit statement by a witness is also consistent with this court's precedent that it is improper for any witness to express a personal opinion on the defendant's guilt. *State v. Garrison*, 71 Wn.2d 312, 215, 427 P.2d 1012 (1967); *State v. Trombley*, 132 Wash. 514, 518, 232 P. 326 (1925).

State v. Kirkman, 159 Wn.2d 918, 936-37, 155 P.3d 125 (2007).

V. PROSECUTORIAL MISCONDUCT

As a state agent, the prosecuting attorney represents the people and presumptively acts with impartiality in the interests of justice. *State v. Fisher*, 165 Wn.2d 727, 746, 202 P.3d 937 (2009). Prosecutors are quasi-judicial officers tasked with prosecuting those who violate the peace and dignity of the state and tasked with searching for justice. *State v. Case*, 49 Wn.2d 66, 70, 298 P.2d 500 (1956) (quoting *People v. Fielding*, 158 N.Y. 542, 547, 53 N.E. 497 (1899)). Our supreme court has pronounced that although prosecutors must deal with all that is coarse and brutal in human life,

“the safeguards which the wisdom of ages has thrown around persons accused of crime cannot be disregarded, and such officers are reminded that a fearless, impartial discharge of public duty, accompanied by a spirit of fairness toward the accused, is the highest commendation they can hope for. Their devotion to duty is not measured, like the prowess of the savage, by the number of their victims.”

State v. Warren, 165 Wn.2d 17, 27-28, 195 P.3d 940 (2008) (emphasis omitted) (internal quotation marks omitted) (quoting *State v. Charlton*, 90 Wn.2d 657, 665, 585 P.2d 142 (1978)), *cert. denied*, 556 U.S. 1192 (2009).

State v. Lindsay, 171 Wn. App. 808, 825-26, 288 P.3d 641 (2012).

Mr. Kramer recognizes, that in the heat of battle, statements may be made that are later regretted. Nevertheless, the actions of the prosecuting attorney in eliciting testimony commenting on the veracity of witnesses, eliciting an expert opinion on whether or not a child fabricated a story, disparaging defense counsel and making speaking objections resulted in a denial of Mr. Kramer’s right to due process and a fair trial under the Fourteenth Amendment and Const. art. I, § 3.

We have had numerous occasions to point out the dual roles of a prosecutor. “A prosecutor must enforce the law by prosecuting those who have violated the peace and dignity of the state by breaking the law.” *State v. Monday*, 171 Wn.2d 667, 676, 257 P.3d 551 (2011) (citing *State v. Case*, 49 Wn.2d 66,

70-71, 298 P.2d 500 (1956) (quoting *People v. Fielding*, 158 N.Y. 542, 547, 53 N.E. 497 (1899))). At the same time, a prosecutor “functions as the representative of the people in a quasijudicial capacity in a search for justice.” *Id.* A prosecutor does not fulfill either role by securing a conviction based on proceedings that violate a defendant’s right to a fair trial--such convictions in fact undermine the integrity of our entire criminal justice system. We ... remain committed to the words of *Fielding*, which resonate as strongly today as when they were made over 100 years ago:

“[A] prosecutor ... is a *quasi*-judicial officer, representing the People of the state, and presumed to act impartially in the interest only of justice. If he lays aside the impartiality that should characterize his official action to become a heated partisan, and by vituperation of the prisoner and appeals to prejudice seeks to procure a conviction at all hazards, he ceased to properly represent the public interest, which demands no victim, and asks no conviction through the aid of passion, sympathy or resentment.”

Id. at 676 n.2 (alterations in original) (quoting *Fielding*, 158 N.Y. at 547, 53 N.E. 497, *quoted with approval in Case*, 49 Wn.2d at 70-71, 298 P.2d 500.

State v. Walker, 182 Wn.2d 463, 476, 341 P.3d 976 (2015).

In particular, the following excerpts from the trial transcript are indicative of the prosecuting attorney’s disregard for due process:

Q. After [K.S.] told you that she was glad it was just the girls together and that Mr. Kramer acted like a kid, what did she say then?

MR. HEARREAN: Your Honor, I would note an objection for hearsay, or if he is trying to do this as truth of the matter.

MR. MARTIN: Judge, I think this is all part and parcel **of the truth that Your Honor admitted pretrial.**

JUDGE STROHMAIER: Overruled.

MR. HEARREAN: Still note an objection, hearsay.

JUDGE STROHMAIER: Thank you.

(RP 28, l. 18 to RP 29, l. 4) (Emphasis supplied.)

Q. Why did you want to move before the next schoolyear started?

A. Am I allowed to say?

MR. HEARREAN: Object to the relevancy.

MR. MARTIN: If it's an allegation I need to explore that. My indication is she would indicate the reason for the move is --

JUDGE STROHMAIER: I don't think that is relevant here, is it?

MR. MARTIN: I think it is goes to the credibility of her actions, her being [K.S.].

(RP 165, ll. 2-12)

Q. [By Mr. Martin] Are you aware of any, any circumstances that would have led your daughter to want some kind of vengeance against the Kramer family, or some basis for her making this story up?

A. No.

(RP 168, ll. 1-5)

Q. [By Mr. Martin] When Mr. Hearrean asks you if you want to get Mr. Kramer, do you want him to be convicted of this crime if he is not guilty of it?

A. No. If he is not guilty of it we wouldn't be here.

(RP 297, ll. 13-15)

MR. MARTIN: Judge, I'm going to object to the question, he is asking for a narrative response. He can ask his direct question.

MR. HEARREAN: I'm just asking what happened for the jury.

MR. MARTIN: It's not my fault if Mr. Hearrean is not forming his questions on direct.

(RP 356, ll. 18-24) *See: State v. Lindsay, supra.*

Q. [By Mr. Martin] Do you believe that your sister was telling the truth?

A. At that time, yes.

(RP 364, ll. 24-25)

Q. [By Mr. Martin] You believe that [K.S.] was lying in those accusations; is that true?

A. Yes.

(RP 431, ll. 1-3)

Q. [By Mr. Martin] Your sister, Lisa, discovered you in there alone with [K.S.]?

MR. HEARREAN: Objection, it's like something was wrong.

JUDGE STROHMAIER: I believe discovery applies, go ahead.

MR. HEARREAN: Judge, I don't think he can testify to what his sister did. She's past now so she can't testify what she saw and what she discovered.

MR. MARTIN: **If he believes his client is telling the truth.**

MR. HEARREAN: I object to that.

JUDGE STROHMAIER: The question was proper. Overruled.

(RP 460, ll. 1-14) (Emphasis supplied.)

Again, it is the combination of factors that are implicated in whether or not Mr. Kramer received a fair trial. The prosecutorial misconduct in this case may not have been as egregious as in other cases; but it did adversely impact the overall nature of the trial when considering the she said/he said nature of the testimony.

Prosecutorial expressions maligning defense counsel “severely damage an accused’s opportunity to present his case before the jury.” *Bruno v. Rushen*, 721 F.2d 1193, 1195 (9th Cir. 1983), *cert. denied*, 469 U.S. 920 (1984). Therefore, such expressions constitute “an impermissible strike at the very fundamental due process protections that the Fourteenth Amendment has made applicable to ensure an inherent fairness in our adversarial system of criminal justice.” *Bruno*, 721 F.2d at 1195. We review any abridgement of

this principle's sanctity as "particularly unacceptable."
Bruno, 721 F.2d at 1195.

State v. Lindsay, supra, 827; *see also, State v. Lile*, 193 Wn. App. 179, 208, 373 P.3d 247 (2016).

VI. JUDICIAL COMMENT

Const. art. IV, § 16 states: "Judges shall not charge juries with respect to matters of fact, nor comment thereon, but shall declare the law."

Mr. Kramer contends that the trial court commented on the evidence in the following exchanges:

MR. MARTIN: At any point during your forensic interview with [K.S.], did you have a sense, did she give you any indication that she was fabricating a story?

MR. HEARREAN: Judge, I would object to that, that is a jury question.

JUDGE STROHMAIER: Can she testify to the veracity of a witness?

MR. MARTIN: I think what I'm looking for, Judge, is based upon her expert training, if she saw anything that children typically do to indicate deception.

JUDGE STROHMAIER: I'll allow that.

(RP 141, ll. 1-11)

[NOTE: The Judge is telling the jury an expert can testify to a witness' truthfulness.]

Q. Well, did there ever come a time when you tried to hurt yourself?

MR. HERREAN: Objection, this is so prejudicial. It has nothing to do with the facts of the case and it is prejudicial. I object.

JUDGE STROHMAIER: Objection noted, but I think it is proper at this time.

(RP 243, ll. 8-14)

[**NOTE:** Again, the Judge is indicating that a connection exists between K.S.' later actions and the alleged incident.]

Q. Did your mental condition at that time have anything to do with what happened to you with Mr. Kramer?

MR. HERREAN: Objection, she's not a psychologist.

MR. MARTIN: But she knows how she feels.

MR. HERREAN: That is out of her expertise.

JUDGE STROHMAIER: We're not talking about a clinical definition, we are talking about her personal opinion. I will allow it.

(RP 244, ll. 3-11). *See* prior **NOTES**.

JUDGE STROHMAIER: Those are the words he used back in 2006? Let him testify first, on impeachment you can go into that afterwards. You're putting the cart before the horse.

(RP 462, ll. 3-6)

Furthermore, during the prosecuting attorney's closing argument the trial court commented upon K.S.'s testimony. (RP 496, ll. 17-25)

[Mr. Martin] Sexual contact is not ejaculation. [K.S.] talked to you in court as a 20 year old woman who now understands what those things are, that the defendant ejaculated. She could have understood that as a child, but she can --

MR. HERREAN: Objection, speculation that a child wouldn't understand that.

JUDGE STROHMAIER: He's making an argument about that, he's not saying what she believes.

The Court in *State v. Walters*, 7 Wash. 246, 250 (1893) stated:

All remarks and observations as to the facts before the jury are positively prohibited, and if any such are made, the judgment will be reversed unless the appellate court can see that the accused was in nowise prejudiced thereby.

See also: State v. Francisco, 148 Wn. App. 168, 199 P.3d 478, *reconsideration denied, review denied* 166 Wn.2d 1027, 217 P.3d 337 (2009).

It does not matter if a judge's comment occurs in giving the jury instructions, ruling on matters of evidence, admonishing counsel, or otherwise making statements during the course of a trial indicating his opinion on any portion of the evidence and/or testimony.

The purpose of article 4, section 16 "is to prevent the jury from being influenced by knowledge conveyed to it by the court as to the court's opinion of the evidence submitted." *Seattle v. Arensmeyer*, 6 Wn. App. 116, 120, 491 P.2d 1305 (1971) (quoting *Heitfeld v. Benevolet & Protective Order of Keglers*, 36 Wn.2d 685, 699, 220 P.2d 655, 18 A.L.R.2d 983 (1950)). ... "To constitute a comment on the evidence, it

must appear that the court's attitude toward the merits of the cause are reasonably inferable from the nature or manner of the court's statements." *State v. Carothers*, 84 Wn.2d 256, 267, 525 P.2d 731 (1974).

State v. Lord, 117 Wn.2d 829, 862-63, 822 P.2d 177 (1991).

It is Mr. Kramer's position that each of the mentioned incidents may, in and of itself, not constitute a prejudicial comment; but, when considered together under a harmless error analysis, and in conjunction with other errors, the prejudice to Mr. Kramer is compounded. *See: State v. Boss*, 167 Wn.2d 710, 223 P.3d 506 (2009).

VII. CUMULATIVE ERROR

Under the cumulative error doctrine a defendant may be entitled to a new trial when the trial court's multiple errors combine to deny the defendant a fair trial. *In re Pers. Restraint of Lord*, 123 Wn.2d 296, 332, 868 P.2d 835 (1994). The defendant bears the burden of proving an accumulation of error of sufficient magnitude to warrant a new trial. *Lord*, 123 Wn.2d at 332; *see, e.g., State v. Perrett*, 86 Wn. App. 312, 322-23, 936 P.2d 426 (1997). A defendant is entitled to a fair trial but not a perfect one, for there are no perfect trials. *Brown v. United States*, 411 U.S. 223, 231-32, 93 S. Ct. 1565, 36 L. Ed.2d 208 (1978).

State v. Lazcano, 188 Wn. App. 338, 370, 354 P.3d 233 (2015).

The errors occurring during the course of Mr. Kramer's second trial deprived him of a fair trial in contravention of the due process guarantees of the Fourteenth Amendment to the United States Constitution and Const. art. I, § 3.

Evidentiary error in admitting child hearsay at the second trial constituted bolstering of K.S.'s testimony.

In addition to bolstering, the hearsay testimony also vouched for K.S.'s credibility.

Moreover, the prosecuting attorney's questioning of witnesses about the truthfulness of K.S. impacted the truth finding process by expressing opinions that invaded the province of the jury.

The procedures employed by the trial court in allowing speaking objections and the lack of sidebars when counsel engaged in unauthorized argument before the jury further exacerbated the unfairness of the proceedings.

Furthermore, the trial court's various comments, amounting to a violation of Const. art. IV, § 16 detracted from the overall fairness of the trial.

Mr. Kramer maintains that *State v. Swenson*, 62 Wn.(2d) 259, 382 P.(2d) 614 (1963) has a significant bearing on this portion of his argument. The *Swenson* Court noted at 277-78:

The trial court must have power to deal with irregularities, outbursts and untoward incidents occurring within or without the courtroom during the trial of a criminal case. This rule is essential to the very maintenance of our judicial system, and we have, in effect, said this in *Segress and Smyser v. Smyser*, 19 Wn.(2d) 42, 140 P.(2d) 959; *Turner v. Wenatchee Vinegar Co.*, 162 Wash 313, 298 Pac. 683; and *Kayser v. Foster*, 138 Wash. 484, 244 Pac. 708. But this court cannot ignore that the quantum of irregularities must be considered on review. Attention must be given to the accused's predicament where, caught in the web of circumstances at the trial over which neither court nor counsel has control or power to alter, he seeks a forum free from emotion and prejudice. It is told over and over in the books that the law and the courts are powerless to make correction unless the circumstances of abuse of discretion are apparent, item by item, to the reviewing tribunal. What then becomes of substantive due process? How weigh the scales to measure the error, item by item, or in the sum?

The oft-repeated declaration of the rules reserving to the trial court broad discretionary powers to conduct a trial, preserve order and govern the order of proof, ought not to be

used as a refuge wherein courts of review hide from the exigencies of due process. The mere utterance of this rule of broad discretion without critical examination of the circumstances which invoke it will tend in time to erode the fundamentals of due process prescribed by the bill of rights.

Mr. Kramer recognizes that if each of the assigned errors is viewed separately, then the child hearsay exception represents the critical impact on his right to due process. However, when the other assigned errors are considered in their totality it is apparent that Mr. Kramer's second trial was not a fair trial.

The overriding consideration is that this was a she said/he said case that segued into testimony from various witnesses that differed in a significant degree from their testimony at the first trial.

Moreover, the testimony bolstered K.S.'s testimony in the second trial. The forensic interviewer's testimony, which was not presented at the first trial, acted as an expert opinion on K.S.'s veracity.

The implications of the multiple errors are indicative of witness mind-set that "we are out to get him."

In particular, the repeated discrepancies in K.S.'s testimony, including assertions of lack of vocabulary to explain circumstances; the failure of attorneys, the forensic interviewer, and others to ask her appropriate questions about what happened; and similar claims by her grandmother and mother all support Mr. Kramer's position.

VIII. LEGAL FINANCIAL OBLIGATIONS

According to Mr. Kramer's original Judgment and Sentence he was previously convicted of second degree theft. A \$100.00 DNA fee was collected in connection with that

conviction. The second imposition of the DNA fee is error based upon *State v. Ramirez*, 191 Wn.2d 732 (2018).

Additionally, the \$200.00 filing fee (Clerk's cost) was also erroneously imposed. The *Ramirez* Court determined that LAWS OF 2018, ch. 269, § 17 applied retroactively to any and all cases that were still pending or on appeal. Thus, even though the effective date of the bill was June 7, 2018, Mr. Kramer is entitled to its benefit.

CONCLUSION

When credibility is a central issue in a case (*e.g.*, she said/he said) it is fundamentally unfair to allow the introduction of evidence that bolsters a critical witness' testimony. The use of child hearsay in Mr. Kramer's trial was not only unfair; but also unnecessary.

K.S. is now twenty (20) years old. RCW 9A.44.120 applies to children under ten (10) years of age. The testimony of Suzanne Franks, Mary DeBoer and Karen Winston vouched for and bolstered K.S.' testimony.

The prejudice to Mr. Kramer cannot be taken lightly. He is serving a sentence of life imprisonment without possibility of parole. The State's argument concerning the law of the case and the trial court's acceptance of it does not comport with the purpose behind the child hearsay statute.

A combination of unnecessary child hearsay, vouching for that witness' credibility, bolstering of witness testimony, commenting on another witness' credibility, prosecutor misconduct, improper judicial comment and procedural error (*i.e.*, speaking objections and lack of sidebars) necessitates reversal of Mr. Kramer's conviction and remand for a new trial.

In the event the Court disagrees with Mr. Kramer's analysis then the discretionary LFOs and the DNA fee must be removed from the judgment and sentence.

DATED this 2nd day of August, 2019.

Respectfully submitted,

s/ Dennis W. Morgan
DENNIS W. MORGAN WSBA #5286
Attorney for Defendant/Appellant.
P.O. Box 1019
Republic, WA 99166
(509) 775-0777
(509) 775-0776
nodblspk@rcabletv.com

APPENDIX “A”

1 At any point during your forensic interview
2 with Kaitlynn, did you have a sense, did she give you any
3 indication that she was fabricating a story?

4 MR. HEARREAN: Judge, I would object to that,
5 that is a jury question.

6 JUDGE STROHMAIER: Can she testify to the
7 veracity of a witness?

8 MR. MARTIN: I think what I'm looking for,
9 Judge, is based upon her expert training, if she saw
10 anything that children typically do to indicate deception.

11 JUDGE STROHMAIER: I'll allow that.

12 Q. (By Mr. Martin) So did you hear the question?

13 A. I did.

14 Q. Can you answer that question?

15 A. There was really nothing that became a red flag to me
16 in terms of some kind of fabrication. Part of that visit
17 she was without any prompting at all, she told me that that
18 had happened with Bill, and was a typical eight year old
19 response to the questions.

20 Q. And you had a series of quotes in your report, were
21 those exact quotes that Kaitlynn said to you?

22 A. Yes, those are exact quotes from my notes.

23 Q. Why do you show exact quotes in your report?

24 A. Well, because I want to be able to dictate what the
25 child had said in their own words, so that's why I copy it

Betty Sitter, CSR
12308 East 4th Avenue 141
Spokane WA 99216 509-926-2670/509 413-3003

NO. 35062-2-III

COURT OF APPEALS

DIVISION III

STATE OF WASHINGTON

| | | |
|------------------------|---|-------------------------------|
| STATE OF WASHINGTON, |) | |
| |) | LINCOLN COUNTY |
| Plaintiff, |) | NO. 05 1 00015 2 |
| Respondent, |) | |
| |) | |
| v. |) | CERTIFICATE OF SERVICE |
| |) | |
| WILLIAM JOSEPH KRAMER, |) | |
| |) | |
| Defendant, |) | |
| Appellant. |) | |
| _____ |) | |

I certify under penalty of perjury under the laws of the State of Washington that on this 2nd day of August, 2019, I caused a true and correct copy of the *MOTION AND AFFIDAVIT TO EXTEND TIME TO DATE OF FILING BRIEF OF APPELLANT* and *BRIEF OF APPELLANT* to be served on:

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Spokane, WA 99201

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GRETCHEN EILEEN VERHOEF
Spokane County Prosecutor's Office
1100 W Mallon Ave
Spokane, Washington 99260-0270
gverhoef@spokanecounty.org

E-FILE

WILLIAM JOSEPH KRAMER #719978
Airway Heights Corrections Center
PO Box 2049
Airway Heights, Washington 99001-2049

U. S. MAIL

s/ Dennis W. Morgan
DENNIS W. MORGAN WSBA #5286
Attorney for Defendant/Appellant.
P.O. Box 1019
Republic, WA 99169
Phone: (509) 775-0777
Fax: (509) 775-0776
nodblspk@rcabletv.com

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