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NO. 36610-3-III

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

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STATE OF WASHINGTON,

Respondent,

v.

ROGER WILLIAM FLOOK, JR.,

Appellant.

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

The Honorable Scott D. Gallina

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BRIEF OF APPELLANT

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A. INTRODUCTION

Every person accused of a crime has a constitutional right to a fair trial, not a perfect trial, but a fair trial. As in every criminal case, the jury was instructed that a “defendant is presumed innocent” and this “presumption continues throughout the entire trial unless during your deliberations you find it has been overcome by the evidence beyond a reasonable doubt.” Accordingly, every defendant has a right to present evidence in his defense and have evidence presented properly for the jury to consider fully, fairly, and carefully.

At the start of a trial, the jury knows nothing about the case. Through the course of the trial, the evidence shapes the case for the jury. As a consequence of the court erroneously excluding evidence, improper opinion testimony as evidence, and receiving ineffective assistance of counsel regarding evidence, Roger William Flook, Jr. was denied his right to a fair trial.

His conviction must be reversed.

B. ASSIGNMENTS OF ERROR

1. The trial court erred in excluding testimony from Flook in violation of his constitutional right to present a defense.

2. The trial court erred in excluding testimony from another witness in violation of his constitutional right to present a defense.

3. The improper opinion testimony of the complaining witness's mother violated Flook's constitutional right to a trial by jury.

4. The improper opinion testimony of the sheriff who investigated the case violated Flook's constitutional right to a trial by jury.

5. The trial court erred in overruling defense counsel's objection to the sheriff's improper opinion testimony.

6. Defense counsel failed to have Flook testify on direct examination about his crimes of dishonesty to mitigate the adverse effect of a criminal past.

7. Defense counsel failed to move to admit evidence helpful to Flook's defense.

8. Defense counsel improperly objected during direct examination, allowing the State to ask the complaining witness leading questions.

9. Flook was denied his constitutional right to effective assistance of counsel.

10. Cumulative error denied Flook his constitutional right to a fair trial.

11. The trial court erred in imposing community custody conditions that are unconstitutionally vague.

C. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. The Constitutions of The United States and State of Washington guarantee an accused the right to present a defense. Did the trial court violate Flook's constitutional right to present evidence in his defense where it excluded testimony from him and another witness, which would have refuted testimony by the complaining witness's mother and cast doubt on the credibility of the complaining witness? (Assignments of Errors 1, 2).

2. The Constitutions of the United States and State of Washington guarantee an accused the right to a trial by jury. Did the improper opinion testimonies of the complaining witness's mother and the sheriff which implied guilt deny Flook his constitutional right to a jury trial? (Assignments of Error 3, 4, 5).

3. The Sixth Amendment right to competent counsel is fundamental to ensuring fairness in our adversarial process. Was Flook denied his constitutional right to effective assistance of counsel where defense counsel (a) failed to mitigate the adverse effect of his past crimes of dishonesty by not having him testify about the convictions on direct examination (b) failed to move to admit evidence the defense introduced which was helpful to Flook's defense and (c) improperly objected which

allowed the State to ask the complaining witness leading questions about other bad acts on direct examination?

4. Did the accumulation of errors infringing on Flook's constitutional rights deny him a fair trial?

5. Is remand required where the trial court imposed community custody conditions declared unconstitutionally vague by this Court?

D. STATEMENT OF THE CASE

1. Procedure

On September 30, 2015, in the name and by the authority of the State of Washington, the Prosecuting Attorney for Asotin County charged appellant, Roger William Flook, Jr., with rape of a child in the first degree and child molestation in the first degree. CP 1-2; RCW 9A.44.073, RCW 9A.44.083.

Following a trial before the Honorable Scott D. Galina, a jury found Flook guilty as charged. The court sentenced Flook to a concurrent sentence of 279 months and 174 months and community custody and imposed legal financial obligations. CP 3-15. Flook filed a notice of appeal on March 23, 2016. CP 16-17.

On July 11, 2017, this Court reversed Flook's convictions and remanded for a new trial, concluding that during an officer's testimony he

improperly vouched to the credibility of the victim and the lack of veracity of Flook. *State v. Flook*, 199 Wn. App. 1052 (2017).

A retrial resulted in a jury finding Flook not guilty of rape of a child in the first degree and guilty of child molestation in the first degree on December 14, 2018. CP 127. On February 4, 2019, the court sentenced Flook to 186 months in confinement and community custody and imposed legal financial obligations. CP 165-77. Flook filed a timely notice of appeal. CP 185-86.

2. Testimony

a. Background

Roger Flook and Martha Montenegro met in 2009 and married in 2010. RP 518, 702-03. Montenegro was previously married to Aaron Sheridan and they had two children. A daughter A.S. was born February 3, 2003 and a son J.S. was born on January 7, 2004. RP 522, 434-35. In June 2014, Flook and Montenegro were living in Endicott with the children. RP 522. On June 6, 2014, the family travelled to Clarkston for a marriage retreat and stayed at a Quality Inn. RP 521-22, 732-34. Flook, Montenegro, and the children moved out of their Endicott home in the fall of 2015. RP 363. Montenegro filed for a divorce from Flook in December 2015, which became final in March 2016. RP 519.

b. Investigation

On August 24, 2015, Whitman County Sheriff Brent Myers received a referral from Child Protective Services (CPS) to investigate allegations that twelve-year-old A.S. was sexually abused by Roger Flook. RP 301-03. A counselor, Nicole Konen, made the initial report to CPS. RP 309-10. Myers has specific training in interviewing adults and children in crimes of a sexual nature. He uses the Harborview Method when interviewing children to establish whether they know “the difference between truth and untruth.” RP 297-98.

He interviewed A.S. who told him what happened at a hotel during a marriage retreat. A.S. said she, her mother, Flook, and her brother slept in one bed. Flook laid on one side of the bed and her mother was on the other side with her and her brother in the middle. She slept next to Flook. RP 307-08. A.S. described what she believed Flook did that night and described other incidents that made her uncomfortable. RP 309. Myers learned that A.S. first disclosed what happened to a friend C.S. who she met at summer camp. RP 310-11. A.S. demonstrated that she understood the difference between truth and falsity. RP 305.

Three days later Myers interviewed Montenegro who said the family went to Clarkston for a marriage retreat and stayed at a Quality Inn. She affirmed A.S.’s account of the sleeping arrangements. RP 311-12, 315.

After questioning Montenegro, Myers told her that he should also interview Flook. Montenegro drove home and returned with Flook a couple hours later. RP 312, 315. Myers told Flook that he was not under arrest but faced some serious charges and as a precaution advised him of his rights. Flook voluntarily spoke with him while Montenegro sat at his side. RP 314-18, 679. During the interview Flook began crying. RP 679-80.

When Myers asked Flook about the marriage retreat and staying at a hotel, he could not recall until Montenegro reminded him. He acknowledged the sleeping arrangements as described by A.S. RP 319-21. Myers asked Flook if he touched A.S. inappropriately and he said he did not. He explained that J.S. has seizures and may have touched A.S. and he reached over once to stop J.S. from seizing. RP 321-23. Myers asked Flook about other incidents of inappropriate contact with A.S. which he denied. RP 323-27.

During Myers's testimony, when the prosecutor asked him about Flook's demeanor during the interview, he replied that "it was very obvious he didn't want to be there or answer any of the questions." RP 328. Defense counsel objected and the court excused the jury to hear the prosecutor's offer of proof. The court ruled that the prosecutor could ask Myers about his behavior. RP 328-31. The prosecutor resumed questioning by asking, "You had indicated that there was -- that times at which he appeared to not

want to be there or answer questions. Can you give specific examples of what you observed about the Defendant?” Myers responded, “Just an overall general reluctance to answer.” RP 332. When the prosecutor continued with his line of questioning, defense counsel objected which the court overruled. RP 332-33.

Based on the information he obtained, Myers went to the Quality Inn in Clarkston and confirmed that the family stayed at the hotel for one night on June 6, 2014. RP 334-35. Myers also interviewed Konen, Sheridan, C.S., and C.S.’s mother Toni Salerno. RP 336-39. On August 31, 2017, one of his deputies notified him that Montenegro’s boyfriend Luke Baumgarten asked that Myers contact him. Myers called Baumgarten who explained that in August 2016 Montenegro sold a truck to a friend, Richard Chittenden, who later discovered a thumb drive in the truck that he believed potentially contained images of A.S. in the shower. RP 339-44. Baumgarten gave Myers the contact information for Chittendon in Colorado and Myers called him. Based on Chittendon’s description of what he saw on the thumb drive, Myers asked Chittendon to send it to him. RP 344-48.

On September 25, 2017, Myers received a package from UPS with Chittendon’s return address on it. He opened the package which contained a small black and red UBS thumb drive. Myers reviewed multiple files on the thumb drive and found two homemade videos of a child in a bath tub

taken on July 9, 2015. RP 348, 354-61. The videos appeared to have been taken from above the ceiling through a vent or some type of fan. RP 363. He asked Montenegro to come to his office to verify the content of the videos. Montenegro identified her daughter in a tub at their home in Endicott. RP 361-63. Myers sealed the thumb drive and entered it into evidence. RP 349, 390, 394. Thereafter, Myers obtained a search warrant and inspected the unoccupied home in Endicott. He discovered a cut-out hole in the ceiling above the bath tub where there was an attic and cut-out openings to get into the attic. RP 364-67. The tub, tiles, and shower curtain in the bathroom resembled the bathroom depicted in the videos. RP 365.

Myers identified photographs of the bathroom taken during the search which he believed matched the videos. RP 373-87. The State moved to admit the thumb drive as evidence. RP 387, 393-97. Defense counsel objected, arguing lack of foundation and no chain of custody. 387-97. The court admitted the thumb drive, ruling that the State met the requirements for admissibility under the rules of evidence<sup>1</sup> and allowed the jury to view the videos. RP 398, 412-14.

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<sup>1</sup> “The requirements of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims.” ER 901(a).

c. Discovery of the Thumb Drive

Richard Chittenden and his wife were friends with Martha and Roger Flook.<sup>2</sup> RP 650, 668. In October 2015, Chittenden bought a Chevy Silverado truck from Martha. RP 651-53. He previously saw the truck several times and thought it belonged to Roger. RP 652. Two or three months later when he hit a ditch while driving the truck he found a thumb drive by the gas pedal. Based on where the thumb drive landed, it appeared to have been stashed up in the dashboard. RP 653-54.

Chittenden used the thumb drive on his Playstation 4 system for a while and then left it in a wicker basket. After upgrading to an Xbox 1 system and moving a couple of times, he rediscovered the thumb drive. RP 655-60. When he plugged it into his Xbox, he found a library of adult porn. As he scrolled through the videos, he found two personal files containing videos. He opened one of the files and recognized a beach towel in the Flooks's bathroom. RP 661-63.

Chittenden called Martha on Facebook programmed on his phone and showed her the video. She recognized the bathroom and young female. RP 664-65. Then he talked to Luke Baumgarten, Martha's fiancée who is an attorney. Baumgarten instructed him to send the thumb drive to the

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<sup>2</sup> Montenegro had the last name Flook during the marriage. RP 435. For clarity, the Flooks will be referred to by their first names for Chittenden's testimony.

Sheriff's Department in Whitman County. A couple weeks later he put the thumb drive in a box, went to the UPS store, and mailed it to Brett Myers. RP 665-69.

d. Martha Montenegro

After being absent for a period of time, Flook moved back into the family home in April 2014 and in June, Montenegro, Flook, and the children went to Clarkston for a marriage retreat. RP 520-21. They stayed at a Quality Inn and shared a large bed. RP 521-22. Flook slept on one side of the bed and she was on the other side with A.S. next to Flook and J.S. next to her. RP 522-23. Montenegro kept coughing throughout the night due to a horrible cold and J.S. who suffers from epilepsy had seizures for several hours because he did not have his medication. RP 523-24. J.S.'s seizures are startle-induced which causes him to flail and raise his arms above his head. RP 524-25. At some point during the night, she got up and sat in a chair on Flook's side of the bed because her coughing triggered J.S.'s seizures. RP 560-63. The chair was about three and a half to four feet from the bed. RP 561-62. She did not see Flook do anything or hear A.S. say anything. RP 563-64, 563-64.

A.S. was typically happy, very smart, and creative. Montenegro noticed that since April 2014 her grades slipped and her attitude changed. Her drawings became very dark and morbid. RP 525-26, 589-90. In the

spring of 2015, Montenegro learned that A.S. was engaging in very sexual and inappropriate chatting on the internet when Flook discovered the activity on her laptop. RP 527-30, RP 570-72. Flook, Montegro, her mother, Sheridan, and his wife met to discuss the matter. She wanted the police to investigate the adult man that A.S. was chatting with, but Flook instead suggested taking all of A.S.'s electronics away for a period of time. They discussed counseling which Flook opposed. As a disciplinary measure, they told A.S. who joined the family meeting that they were taking away her laptop and cell phone. RP 528-30. After the meeting, Flook and A.S. went for a walk around the block while the others kept talking. RP 530-31.

Montenegro recalled one occasion where Flook spanked A.S. on the butt when she walked by. She noticed that A.S. turned around looking very unhappy so she told Flook not to do that anymore. RP 531. In the fall of 2014, A.S. told her she had a bad feeling on the night at the hotel where Flook's hand ended up on her thigh and when she tried to pull away his grip tightened. Upon further questioning, A.S. said she talked to Flook already and "everything's good now and we know what actually happened." RP 532.

Montenegro learned more about the night at the hotel when she and the children were shopping at Walmart. She received an urgent text from

Sheridan who immediately came to the store and spoke with A.S. After Sheridan explained what happened, Montenegro spoke with A.S. who told her about that night and several other things. RP 532-34. When she asked A.S. if Flook touched her private parts, she said he never touched her there. RP 581-82. Subsequently, Montenegro claimed that A.S. said he “put his hands in her panties and touched her inappropriately.” RP 609-10.

Shortly thereafter, Sheriff Myers interviewed Montenegro about the hotel incident. RP 534-35. She explained that A.S. initially told her someone touched her on the leg during the night at the hotel. She told A.S. it was probably her brother who grabs and throws his arms when he has seizures. RP 578-79. Montenegro told Myers that A.S. can sometimes be dishonest. RP 580-81. She thought A.S. made the accusations against Flook because she had her electronics taken away. RP 597. During the interview with Meyers, she speculated that A.S. may have come up with the idea from a movie the family watched together about a man named Roger who sexually molested a child. RP 598-99.

Myers asked her whether Flook would come in and talk to him. Montenegro thought he might if she came with him. She located Flook and drove him to the station for an interview with Myers. On the way to the interview, Flook said he and A.S. had talked about what happened at the hotel and she accepted the explanation that J.S. touched her during his

seizures. RP 535-36. Montenegro felt extremely confused and she did not want to believe that the allegations were true, but her attitude changed during the interview when Flook told Myers that he did not remember ever going to Clarkston. RP 536-38. Conversely, she was familiar with A.S.'s description of "his sort of start and stop" because when she and Flook were in bed, he made sexual advances in the same way. RP 539-40.

Montenegro became aware of additional evidence in the case when a thumb drive was found in a truck that she had sold. Flook drove the truck but she owned it. On October 9, 2015, she sold the truck to Richard Chittenden who discovered the thumb drive in 2017. RP 541-45. Chittenden called her from Colorado on a video call and showed her a video he found on the thumb drive. She recognized her daughter in the shower and told him to mail her the video. RP 545-46. When her fiancée came home, she explained what happened and that she asked Chittenden to mail the thumb drive to her. Her fiancée told her "not to do that" and he called the police. RP 546-47. They told Chittenden where to mail the thumb drive and told the police to expect it. She then received a call from Myers and went to his office where he played the video on his computer. She identified her daughter in the bathroom of their home in Endicott. RP 547-48. Montenegro never saw J.S. go up in the attic and because of his epilepsy he

could not have gotten up there. She saw Flook go up in the attic a few times through holes in the ceiling. RP 549-51.

In 2011, Child Protective Services (CPS) contacted Montenegro regarding A.S. She recalled the CPS report concerning A.S. talking at school about her “massage salon.” RP 554. When A.S. was eight years old, Flook’s brother lived with the family for a few months. She would walk and sit on Flook’s and his brother’s backs to try to pop their backs. A.S. created a menu where she would charge for different services. RP 554-58.

During cross-examination, defense counsel began asking Montenegro about the CPS report and the prosecutor objected but reconsidered and said he had no objection to counsel reading the entire report. Defense counsel responded, “I’d be happy to read the whole thing if that’s Counsel’s offer. I have to ask for the Court’s guidance on this. I’ll just do whatever you want.” RP 557-58. The court ruled that further questions are disallowed because Montenegro said she “does not recall the report.” RP 558.

Montenegro denied that she caught A.S. and J.S. playing sex games together and disciplined A.S. RP 584-86. She also denied that a boy named Alex who lived a block away from their home in Endicott was A.S.’s boyfriend and that they engaged in inappropriate sexual behavior at a nearby park. RP 586-87.

When Montenegro was moving out of the Endicott home she asked Kendra Hergert, Flook's aunt, to come by to unlock the door because the locks had been changed. During their conversation, she told Hergert she "believed A.S." about what happened the night at the hotel. RP 604.

e. Aaron Sheridan

In April 2015, the family met after sexually explicit texts and pornography were discovered on A.S.'s electronics. RP 449-50, 453. The devices were taken away from her as a disciplinary measure and they sent A.S. to counseling once a week for about a year. RP 450, 453-54. During that time, Sheridan never heard anything about any alleged abuse by Flook. RP 454.

Sheridan first became aware of sexual abuse allegations when he received a call from Parks and Recreation that Toni Salerno, the mother of a friend of A.S. from summer camp, wanted him to call her. He called Salerno who told him about an event in June 2014. RP 436-38. After their conversation, Sheridan called Montenegro who was at Walmart with the children. He drove to Walmart and talked to A.S. RP 438. He and Montenegro decided to call A.S.'s counselor Nicole Konen who asked to see A.S. After Konen met with A.S. she reported what she learned. RP 441-42.

Sheridan's son J.S. has epilepsy which causes seizures. RP 442. His seizures have been different in the last couple of years, but in 2014 he would contort his body and raise his hands behind his head. His body would jerk and shake. RP 443-44.

f. Counselor

In April 2015, A.S.'s parents asked Nicole Konen, a mental health counselor, to meet with A.S. because they were concerned about her behavior. A.S.'s grades were falling and she was "sexting," engaging in chat rooms and exchanging pictures with strangers. RP 228, 238-39. Konen met with A.S. every week for a year and then every other week through the second year. On August 24, 2015, Sheridan called her and A.S. made some disclosures to her during their session later that day. The session was different because A.S. specifically talked about things that happened to her, which led Konen to believe she had been sexually abused. RP 240-43, 248. Konen reported to authorities what sounded like sexual abuse. RP 248.

Konen estimated that she had more than 20 sessions with A.S. before she made allegations against Flook. RP 255-56. At the previous sessions she was upset about her media being taken away and was aware that Flook initiated restricting her media. RP 261. During the August 24<sup>th</sup> session, A.S. told her that the alleged incident happened while she, her brother, and Flook were in bed but she did not mention that her mother was

there or that Flook said something to her. RP 261-62. A.S. said when she laid in bed with her brother and Flook, “she felt a large hand go down her pants.” RP 264.

g. A.S. and J.S.

In the summer of 2014 A.S. lived in Endicott with her mom, stepdad (Flook) and brother J.S. RP 471-72. The family took a trip and stayed at a hotel. They all slept in a full-size bed with Flook on one end, A.S., her brother, and mother. RP 472-73. She wore a shirt and pants to bed. RP 473. During the night, A.S. awoke when she felt a big hand on her upper right thigh. The hand was bigger than J.S.’s hands. RP 474-75. The hand left and then came back higher to her waist. It went away and came back reaching into her pants and underwear, touching her “vagina.” RP 475-76. It went away again and came back between her “labia.” RP 477-78. When the hand left again, A.S. pretended she was asleep and rolled on her side facing her brother. RP 478. It was Flook’s hand. RP 478. As she turned away from Flook, he “grabbed my arm and pulled kind of gently and I heard him whisper like come on.” RP 478.

A few months later, A.S. sent a text to Flook telling him that she knew what he did. Then they talked about what happened and he seemed shocked and shaken. RP 481. Flook said it was her brother and he thought he was pulling on her brother’s arm. RP 479-81. A.S. recalled that her

brother was having seizures and rolled toward her mother with his arms in the air, kicking her mother. RP 478-79.

A.S. disclosed what happened that night to her brother the next day but she forgot that she told him. RP 482, 496-97, 509-10. She also told her cousin, a friend at school, and a friend she met at summer camp named C.S. RP 482-83. After she told C.S., she talked to her father and mother at Walmart. She was nervous and scared when she talked later to a lady from CPS and Sheriff Myers. RP 482-83. Besides the night at the hotel, other incidents involving Flook made A.S. uncomfortable. She described him spanking her on the butt, showing her cartoon pornography, having her sit on his lap, and talking about her mother's sex toys and his own porn site. RP 484-87.

At some point, Flook looked through A.S.'s electronics and discovered inappropriate text messages and pictures sent to her. She engaged in sexting on adult internet chat rooms. RP 487-88, 492-93. He told her parents and after a family meeting she had her electronics taken away. RP 488, 493, 508-09. At first A.S. was mad at Flook but after the meeting he said she could use his phone to set up a fake account for sexting without telling her mother. RP 489, 508-09. She did not have access to her electronics when she went to summer camp and met C.S. RP 508.

A.S. admitted that her grades in school were not very good. Her grades were better before Flook moved back home but she does not fault Flook for her poor grades. RP 505-06, 507-08. In April 2015 A.S. began meeting with a counselor. RP 498. She was upset that her electronics were taken away and discussed it with her counselor. RP 498. In August 2015 she told her counselor about what happened at the hotel. RP 499-500.

J.S. recalled living in Endicott with his mom, his sister, Flook, and Flook's father. He did not remember any holes in the ceiling and was not aware of an attic in the house. RP 647-48.

h. C.S.

In 2015 C.S. met A.S. at summer camp. RP 623-24. When they were talking about crushes they had on classmates, the conversation led to A.S.'s stepdad. She did not like him very much because "he would sexually -- not abuse, but sexually kind of harass her sometimes." RP 625. C.S. sensed that A.S. was upset and wanted it to stop. RP 626-27. C.S. felt sorry for A.S. so when she went home she told her mother about what A.S. disclosed. Her mother called the police who came and questioned them. RP 628-29. On September 3, 2015, C.S. met with a sheriff and told him what A.S. said. RP 638-39.

While cross-examining C.S., defense counsel asked her if A.S. also talked "about sexual contact she was having with her boyfriend, Alex."

Following an objection from the State the court excused the jury. RP 630. Defense counsel made an offer of proof by asking C.S. if she remembered talking to the sheriff about A.S. telling her that A.S. and her boyfriend Alex were experimenting with sexual activity and C.S. said she did. RP 631-32. The court ruled that such testimony is inadmissible under the rape shield statute where the defense has not made a motion supported by an offer of proof and the State has not opened the door to such testimony. RP 634-35.

i. Kendra Hergert

Hergert is Flook's aunt and has known him since his birth. When Flook married Montenegro, Hergert hosted their wedding reception at her house. RP 693-94. On October 4, 2015, she ran into Montenegro and they talked for a while. RP 605-96. Montenegro told her about the night at the hotel in Clarkston. She was coughing from being sick so she got up and sat in a chair right next to Flook. Her son J.S. had seizures throughout the night and Flook reached over to comfort him. RP 696-98. Montenegro said she was awake all night because she could not sleep and absolutely nothing happened. RP 699.

j. Roger Flook

Flook loves A.S., J.S., and his former wife. "I never wanted anything more than that, than a family. RP 704. The family went to Clarkston for a marriage retreat and stayed at a hotel. RP 732-34. Their

church made a reservation for a room with a king-size bed. When they arrived, he suggested rollaway beds but none were available. RP 735-36, 739. They slept with him on one end, A.S., J.S. and Montenegro on the other end. RP 741-42. Montenegro was very sick and J.S. was having seizures. RP 741-42. When Flook fell asleep, Montenegro was sitting on an ottoman right next to his side of the bed. During the night when J.S. started seizing, he reached over A.S. to hold J.S.'s arms down to prevent him from hurting himself. A.S. did not say anything to him. RP 753-54.

Several months later, A.S. sent him a text saying she knew what he did at the hotel. RP 715, 784. When they talked about it, A.S. said he touched her on the leg and he suggested that perhaps J.S. touched her during his seizures. Flook assured her that he did not touch her and A.S. "said she didn't think I did that." RP 784.

In August 2015, Flook discovered inappropriate materials on her electronics. He found texts, chat rooms, and hookups.com where she engaged in graphic role playing. RP 715-20. Flook told Montenegro who contacted Sheridan and they decided to have a family meeting. Flook, Montenegro, Sheridan, his wife, and Montenegro's mother met at Sheridan's house. They talked to A.S. when she came home. RP 724-27. A.S. became upset and mad when they took away her Kindle, cell phone, and laptop as a disciplinary measure. RP 729. After the meeting, Sheridan

asked Flook to make a disk of what A.S. had on her computer and wipe the computer. He wiped A.S.'s laptop and gave the disk to Montenegro's mother. RP 727-28.

Flook denied that he offered to create a secret website for her and that they went for a walk after the meeting. RP 729, 791. The family decided to send A.S. to a counselor and he never heard about any allegations during the eight months to a year that A.S. went to counseling. RP 730-31.

While viewing the photographs of the Endicott house taken by the Sheriff's Department in 2017, Flook explained that the house looked completely different. The hole next to the ceiling fan above the bathroom was not there when he and his family lived in the house. RP 757. There was no structural or functional reason for the hole above the shower head. RP 794-96. Flook went up in the attic five or six times whenever repairs were needed. RP 711, 777.

When defense counsel began asking Flook about an incident involving A.S. and J.S., the State objected and the court excused the jury. RP 759. Defense counsel argued that Montenegro denied that she caught A.S. and J.S. playing doctor and Flook would testify to the contrary. RP 760-63. Counsel proffered that Flook would testify that he heard Montenegro and A.S. screaming and yelling in the bathroom and when Montenegro came out very upset she told him that she caught A.S. and J.S.

experimenting sexually. RP 761-62. The court ruled that such testimony is disallowed. RP 763.

Flook recalled a time when the children were playing around in the kitchen while he was cooking and Montenegro sat in the living room. They would sneak up behind him and whack him on his butt. When A.S. had her back turned, he whacked her on the butt a little too hard and she gave him a long look. Montenegro later told him not to do that anymore. RP 767-68. At another time, he was in his truck working on the stereo which has a TV screen for DVDs. A.S. came out and sat on his knee for a while until he had to excuse himself to use the restroom. RP 768-69, 797-98. Flook denied telling A.S. that he had a porn site when he attended college and he never downloaded videos or pornography on a thumb drive. RP 771-72, 800.

On September 22, 2011, Flook and Montenegro went on a vacation to Australia for nine months. RP 776. The State asked Flook if he was “being investigated for identity theft at that time.” RP 801. Defense counsel objected and the court excused the jury to hear argument. Over defense counsel’s objection, the court ruled that Flook’s prior convictions were admissible under ER 609. The State presented and the court admitted certified copies of Flook’s 2012 convictions for identity theft, accomplice to identity theft, and possession of stolen property. RP 801-16.

Flook acknowledged that he knew about the identity theft investigation before he went to Australia. He informed the police that he was going on vacation and made arrangements before he left. He returned home to take care of the matter and pleaded guilty to the charges. RP 817-20.

k. Rebuttal.

Susan Montenegro attended a meeting with her daughter Martha, Flook, Sheridan, his wife, and A.S. RP 822. After the meeting, Flook and A.S. went for a walk. Flook never gave her a disk of inappropriate materials found on A.S.'s computer. RP 822-23.

The State recalled Sheridan who described a conversation he had with Flook after the family meeting. Flook suggested wiping A.S.'s computer and he agreed because they were both concerned that A.S. might get in trouble for the content on her computer. RP 824-27. He saw A.S. and Flook leaving after the meeting for a walk. RP 825.

5. Motion to Suppress

On December 6, 2018, the defense filed a motion to suppress evidence obtained from the thumb drive. CP 81-86. The court heard argument on the motion on December 10, 2018, the first day of trial. RP 174-86. Defense counsel argued that the thumb drive should be suppressed because law enforcement failed to obtain a search warrant before searching

its contents, no exception to the warrant applies, and Flook has standing to object to the search. RP 175-78, 183-85. The State argued that the motion should be denied because it is untimely, it fails to comply with the requirements of CrR 3.6, Flook lacks standing, and persons with authority to consent to the search gave consent. RP 178-85.

The court denied the motion to suppress, finding that the motion is untimely, the motion was not supported by an affidavit as required by CrR 3.6.<sup>3</sup> Flook lacks standing where he retained no privacy interest in the thumb drive and disavows ownership of the thumb drive, and parties with authority to consent to a search gave consent. The court did not conduct an evidentiary hearing and entered an order on February 4, 2019, denying the motion to suppress. RP 186-89; CP 162-64.

#### 6. Motion for Mistrial

Aaron Sheridan testified after Counselor Konen and Sheriff Myers.

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3. CrR 3.6 provides in relevant part:

Motions to suppress physical, oral or identification evidence, other than a motion pursuant to rule 3.5, shall be in writing supported by an affidavit or document setting forth the facts the moving party anticipates will be elicited at a hearing, and a memorandum of authorities in support of the motion. Opposing counsel may be ordered to serve and file a memorandum of authorities in opposition to the motion. The court shall determine whether an evidentiary hearing is required based upon the moving papers. If the court determines that no evidentiary hearing is required, the court shall enter a written order setting forth its reasons.

RP 433. During direct examination, the prosecutor asked Sheridan about talking to A.S. at Walmart:

Q What I'm asking, Mr. Sheridan, is that she said -- that she related the event to you.

A Yes.

Q And then what --

[DEFENSE COUNSEL]: Your Honor, I object to that comment of the event. There's no event then proven. So I object to the form of that question.

THE COURT: I think it's pretty clear at this point what the alleged event is, so I'm going to overrule the objection.

RP 440-41.

During a recess thereafter, defense counsel moved for a mistrial asserting that the court made a comment on the evidence by stating in front of the jury that "it is already clear to the jury that the event happened." RP 464. The court denied the motion pointing out that the "record is replete with references to an alleged event." RP 464. When the jury returned, the court reiterated its instruction that the jury must not draw any inferences from comments made by the court. RP 468-69.

E. ARGUMENT

Under the cumulative error doctrine, an appellate court may reverse a defendant's conviction when the combined effect of errors during trial effectively denied the defendant his right to a fair trial even if each error standing alone would be harmless. *State v. Weber*, 159 Wn.2d 252, 279, 149 P.3d 646 (2006).

1. A CRITICAL ASPECT OF FLOOK’S DEFENSE WAS THAT HE DID NOT FILM THE VIDEO OF A.S. THE TRIAL COURT VIOLATED HIS CONSTITUTIONAL RIGHT TO PRESENT A DEFENSE BY EXCLUDING EVIDENCE THAT SUPPORTED HIS DEFENSE.

Both the Sixth Amendment to the United States Constitution and article I, section 22 (amend. 10) of the Washington Constitution guarantee an accused the right to present a defense. *State v. Maupin*, 128 Wn.2d 918, 924, 913 P.2d 808 (1996). Whether rooted in the Sixth Amendment or Due Process Clause, the United States Constitution guarantees a criminal defendant “ ‘a meaningful opportunity to present a complete defense.’ ” *Holmes v. South Carolina*, 547 U.S. 319, 324, 126 S. Ct. 1727, 164 L. Ed. 2d 503 (2006)(quoting *Crane v. Kentucky*, 476 U.S. 683, 690, 106 S. Ct. 2142, 90 L. Ed. 2d 636 (1986)). “The right of an accused in a criminal trial to due process is, in essence, the right to a fair opportunity to defend against the State’s accusations.” *Chambers v. Mississippi*, 410 U.S. 284, 294, 93 S. Ct. 1038, 35 L.Ed.2d 297 (1973). The Sixth Amendment right to present a defense is reviewed de novo. *State v. Duarte Vela*, 200 Wn. App. 306, 317, 402 P.3d 281 (2017).

In opening statements, defense counsel asserted that the “evidence in this case will also indicate that Roger’s ex-wife, Marty, caught the two kids, J.S. and A.S. in sexual behavior.” RP 219. The State objected and the court excused the jury. The State argued that the rape shield law prohibits

accusations of sexual behavior to assail A.S.'s credibility. RP 219-21. Defense counsel argued that Flook's theory regarding the video is that J.S., who had engaged in sexual behavior with A.S. in the past, took the video of her in the shower. RP 221.

The court sustained the State's objection under RCW 9A.44.020:

[I] specifically find that -- that evidence of prior sexual behavior by the alleged victim is inadmissible, especially on the issue of credibility, as particularly pointed on by the statute which requires that a written pretrial motion be made by the Defendant supported by an affidavit or affidavits which offer proof of what shall be stated. And that has not been done -- none of this has been done. And so I am upholding the objection.

RP 222.

During cross-examination of Montenegro, defense counsel questioned her about J.S.:

Q Now, when Counsel asked you who might have taken the video and specifically asked you about J.S. Isn't it a fact that you caught J.S. and A.S. playing sex games together?

A Absolutely not true.

Q Oh, you didn't? And you didn't discipline A.S. to the point that she was bruised?

A Never.

[PROSECUTOR]: Your Honor, I'm going to object to this line of questioning. This is simply trying to paint the Witness in a bad light and also A.S.

[DEFENSE COUNSEL]: Your Honor, it -- we'll connect this up. I'm just asking the questions.

THE COURT: Foundational questions would be appreciated, Counsel.

[DEFENSE COUNSEL]: Okay.

Q Your fiancée is an attorney?

A Yes.

Q So you've been told that you would never have contact with your children again if you supported Roger?

[PROSECUTOR]: Your Honor, I'm going to object. This goes to privilege.

[DEFENSE COUNSEL]: What? They're not married. There's no attorney/client privilege. I don't know what privilege we're talking about.

THE COURT: It does go to witness bias. Go ahead.

Q Have you been told that you didn't support A.S. in this matter and change your position and not support Roger that you wouldn't get to see your children?

A No, I was not told that.

RP 584-86

Counsel then asked Montengro about a boyfriend:

Q A.S. had a boyfriend who lived a block away, correct?

A When?

Q 2013, 2014. A boyfriend that lived a block away -- his name was Alex, right?

A I don't know of any Alex.

Q Did you know of a boyfriend that A.S. had during this period of time that lived a block away?

[PROSECUTOR]: Your Honor, I'm going to object to relevance. Again, this is going to --

[DEFENSE COUNSEL]: Counsel can't ask a question like do you know who might have taken this video without opening the door to other possibilities.

THE COURT: Go ahead, Counsel.

Q Did you know about this boyfriend that lived a block away?

A A block away of which home?

Q The one in Endicott.

A Alex -- yes. He was not a boyfriend.

Q He was a boy?

A He was a boy.

Q He's a friend?

A Yes, but --

....

Q Did you ever witness -- and this is a little confusing, so the names, but I'll try to do the best I can. A.S. and Alex doing inappropriate sexual things to one another at the park in Endicott?

A Never.

RP 586-87.

After Montenegro's testimony, during cross-examination of C.S., defense counsel began questioning her about A.S. "talking about sexual contact she was having with her boyfriend, Alex." RP 630. The prosecutor objected and the court excused the jury. Defense counsel made an offer of proof by asking C.S. about her interview with the Sheriff and C.S. acknowledged that she told him A.S. revealed she had been experimenting sexually with her boyfriend Alex. RP 631-32.

The prosecutor argued that such allegations to attack A.S.'s credibility violate the rape shield law. The court sustained the objection:

My ruling is that to allow that testimony would be violative of the of the rape shield statute, which is firmly in shield status right now and has not, in accordance with the statute governing its breach, been complied with. There has not been a motion made by a Defendant to the Court and the Prosecutor with that offer of proof.

RP 634.

During Flook's testimony, defense counsel began asking him whether during "the period of time when you were living in Pullman, was there an incident where you learned that Marty caught A.S. and J.S.," which drew an objection from the prosecutor and the court excused the jury. RP

759. The prosecutor argued that the court previously ruled that such testimony violates the rape shield law. RP 759-60. Defense counsel reminded the court that it allowed him to question Montenegro about the incident and she “immediately said no very forcefully.” RP 760-61. Defense counsel proffered that Flook would testify that he heard Montenegro and A.S. screaming and yelling in the bathroom. Then Montenegro came out upset and said she caught A.S. and J.S. experimenting sexually and she physically disciplined A.S. RP 760. The court disallowed the testimony. RP 763.

Initially, the court erred in excluding evidence of A.S.’s sexual behavior based on its misapprehension of the rape shield statute. RCW 9A.44.220 provides that evidence of the victim’s past sexual behavior is admissible on the issue of consent pursuant to the following procedure:

(a) A written pretrial motion shall be made by the defendant to the court and prosecutor stating that the defense has an offer of proof of the relevancy of evidence of the past sexual behavior of the victim proposed to be presented and its relevancy on the issue of the consent of the victim.

(b) The written motion shall be accompanied by an affidavit of affidavits in which the offer of proof shall be stated.

The defense was not claiming that A.S. consented. The court therefore erred in excluding evidence of A.S.’s sexual behavior as a result of the defense failing to file a pretrial motion supported by an affidavit.

Consequently, the court erred in not allowing Flook to testify about Montenegro catching A.S. and J.S. engaging in sexual activity and not allowing C.S. to testify that she told the Sheriff that A.S. revealed she had been experimenting sexually with her boyfriend Alex. Such testimony would have refuted Montenegro's claim that the incident involving A.S. and J.S. never happened, that Alex who lived nearby was not A.S.'s boyfriend, and she never saw A.S. and Alex experimenting sexually.

As the Washington Supreme Court emphasized in *State v. Jones*, a “defendant’s right to an opportunity to be heard in his defense, including the rights to examine witnesses against him and to offer testimony, is basic in our system of jurisprudence.” 68 Wn.2d 713, 720, 230 P.3d 576 (2014). When deciding whether to admit or exclude evidence in light of a defendant’s right to present a defense, “the integrity of the truthfinding process and [a] defendant’s right to a fair trial” are important considerations.” *Jones*, 68 Wn.2d at 720 (citing *State v. Hudlow*, 99 Wn.2d 1, 14, 659 P.2d 514 (1983)).

But for the court’s exclusion of the evidence, the jury would have heard from Flook that Montenegro caught A.S. and J.S. engaging in sexual activity. The jury would have also heard from C.S. that A.S. revealed she and her boyfriend Alex experimented sexually. Their testimony called into question the credibility of A.S.’s allegations. The excluded evidence was

central to building Flook’s defense that he was not the one who filmed the video of A.S. and that he did not touch her for sexual gratification.

The trial court erred in excluding the evidence in violation of Flook’s constitutional right to present a defense.

2. NO WITNESS MAY EXPRESS AN OPINION EXPLICITLY OR IMPLICITLY AS TO A DEFENDANT’S GUILT. REVERSAL IS REQUIRED WHERE THE IMPROPER OPINION TESTIMONY OF A.S.’S MOTHER AND SHERIFF MYERS VIOLATED FLOOK’S CONSTITUTIONAL RIGHT TO A JURY TRIAL.

The Sixth Amendment of the United States Constitution and article I, section 21 and 22 of the Washington Constitution guarantee a defendant the right to a trial by jury.<sup>4</sup> “No witness, lay or expert, may testify to his opinion as to the guilt of a defendant, whether by direct statement or inference.” *State v. Black*, 109 Wn.2d 336, 348, 745 P.2d 12 (1987)(citing *State v. Garrison*, 71 Wn.2d 312, 315, 427 P.2d 1012 (1967)). Such testimony is unfairly prejudicial to the defendant because it invades the exclusive province of the jury. *State v. Kirkman*, 159 Wn.2d 918, 927, 155 P.3d 125 (2007).

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<sup>4</sup> “In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury.” U.S. Const. amend VI; “The right of trial by jury shall remain inviolate.” Wash. Const. article I, section 21; “In criminal prosecutions the accused shall have the right . . . to have a speedy public trial by an impartial jury of the county in which the offense is charged to have been committed.” Wash. Const. article I, section 22.

Whether testimony constitutes improper opinion as to the defendant's guilt depends on the circumstances of the case, including (1) the type of witness, (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. *State v. Montgomery*, 163 Wn.2d 577, 590, 183 P.3d 267 (2008).

a. Martha Montenegro

During Montenegro's testimony, the State asked her about the time she spoke with Flook's aunt Kenda Hergert at the home in Endicott:

Q Was that shortly after these -- was that in around the time you moved out of the residence?

A It was -- I had to have her come to the house to unlock it because she changed the locks on me. And in that time, I had a conversation with her.

Q And when was that in relation to when you spoke with -- or when you first spoke with Aaron Sheridan at the Walmart about A.S.'s revelations?

A I think that would have been late October.

Q. Do you recall the substance of that conversation?

A Yes, I do.

Q What did you tell Kenda?

A I told her the exact opposite of what the questions that I was asked today. *I told her that I believed that -- and I gave her my opinion about -- about what happened that night that I believed A.S.*

Defense counsel did not object.

RP 604 (emphasis added).

In *State v. Johnson*, 152 Wn. App. 924, 219 P.3d 958 (2009), the Court reversed Johnson's conviction for second degree child molestation.

152 Wn. App. at 926. During the testimony of two State witnesses, they described a confrontation between the victim and Johnson's wife about the allegation against her husband. They testified that the wife ended up believing the victim. The victim testified that the wife said "I was right, she believed me, she was sorry she didn't believe me." 152 Wn. App. at 926, 932-33.

On appeal, Johnson argued that the trial court erred in admitting testimony about the confrontation because the statements amounted to improper opinion testimony on his guilt. 152 Wn. App. at 929. The Court relied on well settled law that "no witness, lay or expert, may give an opinion, directly or inferentially, on the defendant's innocence or guilt." 152 Wn. App. at 930. Trial counsel did not object but the Court allowed Johnson to raise the issue for the first time on appeal pursuant to RAP 2.5(a)(3). The Court held that the claim of error is constitutional because it implicates Johnson's right to a fair trial by an impartial jury and the error is manifest because it actually affected his right to a fair trial. 152 Wn. App. at 934.

Montenegro testified that A.S. can be dishonest and she initially thought A.S. may have fabricated the allegations against Flook. RP 580-81, 597-98. Her testimony that she later told Hagert that she believed A.S. reinforced A.S.'s accusations. As in *Johnson*, her improper opinion

testimony implying guilt violated Flook's constitutional right to a fair trial by jury.

b. Sheriff Myers

Myers testified that he has specific training in interviewing children and adults in crimes of a sexual nature. RP 297. He said that when he interviewed A.S., she demonstrated she knew the difference between truth and falsity. RP 305. When the prosecutor asked Myers what Flook's demeanor was like during his interview with Flook, he replied, "It was a demeanor of -- to some degree, it was very obvious he didn't want to be there or answer any questions." Defense counsel objected and the court excused the jury to hear argument. RP 328-31. The prosecutor resumed direct examination by repeating Myer's comments:

Q You had indicated that there was -- that times at which he appeared to not want to be there or answer. Can you give specific examples of what you observed about the Defendant?

A Just an overall general reluctance to answer.

Q Let me stop.

A Okay.

Q So when you asked him about the marital retreat and the hotel stay, did he appear to you to be comfortable with the topic?

A No.

RP 332.

In response to further questions, Myers said Flook was reluctant to answer pertinent questions and looked at his wife "almost like asking Martha if I really have to answer these types of questions, is really kind of

the -- no direct eye contact, leaning into her.” Defense counsel objected but the court overruled his objection. RP 333.

In *State v. Haga*, 8 Wn. App. 481, 507 P.2d 159 (1973), the Court reversed Haga’s convictions for the murder of his wife and infant daughter. The ambulance driver who responded to the Haga residence on the morning of the murders testified that Haga did not express any grief and he was very calm and cool. 8 Wn. App. at 489-92. The Court concluded that the “testimony of the ambulance driver was wrongfully admitted. It inferred his opinion that the defendant was guilty, an intrusion into the function of the jury.” 8 Wn. App. at 492. In *State v. Hager*, 171 Wn.2d 151, 158, 248 P.3d 512 (2011), the Washington Supreme Court concluded that a detective’s improper comment that Hager was “evasive” implicated his right to a trial by jury under the Sixth Amendment and article I, sections 21 and 22 of the Washington Constitution.

Myer’s comments that Flook obviously did not want to be at the interview or answer questions and he was reluctant to answer questions for all intents and purposes was the equivalent of the ambulance driver saying Haga was calm and cool and the officer saying Hager was evasive. The State’s entire line of questioning and Myer’s responses, which defense counsel objected to, improperly implied guilt and eroded the presumption of innocence. The opinion of the county sheriff who serves and protects the

community conveyed to the jurors that he thought Flook was guilty. The testimony of an officer “may be especially prejudicial because an officer’s testimony often carries a special aura of reliability.” *State v. Demery*, 144 Wn.2d, 753, 765, 30 P.3d 1278 (2001).

Myer’s impermissible opinion testimony violated Flook’s right to a fair trial by jury.

c. Prejudicial Effect of Improper Opinion Testimony

Under the factors articulated by the Court in *Montgomery*, (1) the testimony of Montenegro and Sheriff, (2) implied that A.S. was truthful and Flook was not, (3) the charges involve sexual touching of a child, (4) Flook’s defense was a general denial, and (5) there was no physical evidence or corroborating eye witnesses. Here, as in most sexual abuse cases, the respective credibility of the victim and the accused is a crucial question because the testimony of each directly conflicts and the two are the only percipient witnesses. *State v. Alexander*, 64 Wn. App. 147, 154, 822 P.2d 1250 (1992); *State v. Fitzgerald*, 39 Wn. App. 652, 657, 694 P.2d 1117 (1985).

The improper opinion testimony unfairly bolstered the credibility of A.S. while undermining the credibility of Flook. Consequently, Flook was denied his constitutional right to a trial by jury.

3. VIOLATIONS OF FLOOK’S CONSTITUTIONAL RIGHT TO A JURY TRIAL AND RIGHT TO PRESENT A DEFENSE WERE NOT HARMLESS BEYOND A REASONABLE DOUBT.

A constitutional error is presumed to be prejudicial and the State bears the burden of proving that the error was harmless. A constitutional error is harmless if the appellate court is convinced beyond a reasonable doubt that any reasonable jury would have reached the same result in the absence of the error. *State v. Watt*, 160 Wn.2d 626, 635, 160 P.3d 640 (2007). “Where the error was not harmless, the defendant must have a new trial.” *State v. Easter*, 130 Wn.2d 228, 242, 922 P.2d 1285 (1996).

The record substantiates that the exclusion of the testimony of Flook and C.S. and the improper opinion testimony of Montenegro and Sheriff Myers was not harmless beyond a reasonable doubt. In light of the fact that the jury found Flook not guilty of count 1 rape of a child in the first degree,<sup>5</sup> it is evident that the State’s case was not overwhelming.

The testimony reflects that both A.S. and J.S. were exposed to sexuality at a very young age. When A.S. was eight years old, her school contacted Child Protective Services due to concerns that she was talking about her massage salon at school. RP 554, 558. She created a menu for

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<sup>5</sup> CP 127

what she charged for different services. RP 555, 558. The situation was serious enough to warrant a CPS investigation.

The family watched a movie together entitled “Where the Heart Is.” RP 598. The story was about a pregnant girl who hid in Walmart and while living there she has a baby. A friend of the girl had a boyfriend named Roger who molested her daughter. RP 598, 605. Montenegro told Sheriff Myers that A.S. may have gotten the idea for her allegations from watching the movie. RP 598-99.

At age 12, A.S. was engaging in sexually inappropriate behavior. She sent texts and chatted with an adult male on the internet. RP 527. Montenegro described the activity as “very sexual; very inappropriate.” RP 528. Flook discovered the inappropriate activity on her laptop and informed Montenegro. RP 529-30. Following a family meeting, A.S. had all of her electronics taken away as punishment. RP 530.

The video of A.S. in the bath tub was taken on July 9, 2015. RP 361. J.S. was eleven years old at that time. RP 435. He has epilepsy and if he does not take his medication he has seizures when he is startled. RP 523-25. J.S. is a typical fun kid who is very energetic, loves to play games and work out. RP 704. There was no evidence that J.S. was incapable of filming the video.

The excluded evidence would have revealed that Flook heard A.S. and Montenegro screaming and yelling in the bathroom about A.S. and J.S. engaging in sexual activity and that A.S. disclosed to C.S. that she had been experimenting sexually with her boyfriend Alex unbeknownst to her mother.

In light of the conflicting testimony, credibility was critical for the jury in deciding beyond a reasonable doubt that A.S.'s allegations were true. The scales of justice were not balanced where the improper opinion testimony of Montenegro and Myers weighed in favor of A.S. and against Flook.

Flook's conviction must be reversed because the violations of Flook's constitutional right to present a defense and right to a jury trial were not harmless beyond a reasonable doubt.

4. FLOOK WAS DENIED HIS CONSTITUTIONAL RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL WHERE DEFENSE COUNSEL'S PERFORMANCE WAS DEFICIENT AND THE DEFICIENT PERFORMANCE PREJUDICED FLOOK.

The Sixth Amendment to the United States Constitution and art. I, section 22 of the Washington Constitution guarantee 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); *State v. Thomas*, 109 Wn.2d 222, 229, 743 P.2d 816 (1987). "The purpose of the requirement of effective

assistance of counsel is to ensure a fair and impartial trial.” *Thomas*, 109 Wn.2d at 225.

To demonstrate ineffective assistance of counsel, a defendant must show that (1) defense counsel’s representation was deficient and (2) the deficient performance prejudiced the defendant. *State v. Hicks*, 163 Wn.2d 477, 486, 181 P.3d 831 (2008)(acknowledging that this state has adopted the standards from *Strickland v. Washington*).

Counsel’s performance is deficient when it falls below an objective standard of reasonableness under prevailing professional norms. *In re Personal Restraint of Davis*, 152 Wn.2d 647, 673, 101 P.3d 1 (2004). Courts engage in a strong presumption that counsel’s representation was not deficient. *State v. Kylo*, 166 Wn.2d 856, 862, 215 P.3d 177 (2009). A defendant can rebut the presumption of reasonable performance by demonstrating that “there is no conceivable legitimate tactic explaining counsel’s performance.” *State v. Grier*, 171 Wn.2d 17, 33, 246 P.3d 1260 (2011)(quoting *State v. Reichenback*, 153 Wn.2d 126, 130, 101 P.3d 80 (2004)).

A defendant establishes prejudice by showing that there is a reasonable probability that the result of the proceeding would have been different but for counsel’s unprofessional errors. *Grier*, 171 Wn.2d at 34.

“A reasonable probability is a probability sufficient to undermine confidence in the outcome.” *Grier*, 171 Wn.2d at 34 (quoting *Strickland*, 466 U.S. at 694-95)).

a. Crimes of Dishonesty

Defense counsel’s trial brief included a motion to exclude Flook’s underlying conduct from his prior convictions:

The defense moves to exclude all evidence of Mr. Flook’s conduct in relation to his prior convictions. This conduct is not relevant to prove that he is guilty of the crimes charged in this case. Further, evidence of any prior conduct, in relation to his convictions, is highly prejudicial and should be excluded from trial. If Mr. Flook chooses to testify, evidence of his 2002 ROC conviction should not be admissible pursuant to ER 609.

CP 55-56.

The State’s brief in response to the defense motions indicates that “[w]ith regard to the Defendant’s convictions for Identity Theft and Possession of Stolen Property in 2012, the State would not seek to introduce these in its case-in-chief, but should properly be allowed to do so, in the event the Defendant testifies pursuant to ER 609.” CP 73.

ER 609 provides in relevant part:

For the purpose of attacking the credibility of a witness in a criminal or civil case, evidence that the witness has been convicted of a crime shall be admitted if elicited from the witness or established by public record during examination of the witness but only if the crime . . . involved dishonesty or false statement, regardless of the punishment.

During motions in limine, the court granted the defense motion:

[PROSECUTOR]: There's a trial brief, Your Honor. I think the second section of that Motion F excludes underlying conduct from his prior cases to the extent it's not relevant or it doesn't -- isn't made relevant by some testimony of the Defendant or otherwise. The State doesn't intend to offer -- and I would cautiously offer that only after discussing that with Counsel and the Court outside the presence of the jury. If I feel like the door's been opened, I will get permission before -- before --

THE COURT: I appreciate that, thank you.

[DEFENSE COUNSEL]: Are we talking about F(2)?

THE COURT: Yes.

[DEFENSE COUNSEL]: So the Court's granting that motion?

THE COURT: Yes

RP 190.

There was no discussion of Flook's convictions for identity theft and possession of stolen property.

During direct examination, Flook testified that he and Montenegro went on a vacation to Australia. RP 704-05. While cross-examining Flook, the prosecutor asked, "You were being investigated for identity theft at that time, correct?" Defense counsel immediately objected and asked the court to excuse the jury. RP 801. Defense counsel argued that the court ruled that all of Flook's convictions were inadmissible and moved for a mistrial. RP 801-03, 806-07. The prosecutor argued that the court ruled only that Flook's conviction for rape of a child was not admissible, and because Flook

put his credibility in issue by testifying the State can ask him about “crimes of moral turpitude” under ER 609. RP 803-04.

The court denied the motion for a mistrial, ruling that pursuant to ER 609, the State can use Flook’s convictions for the purpose of impeachment. RP 808. The prosecutor resumed cross-examination and asked Flook if he has 2012 felony convictions for 1<sup>st</sup> and 2<sup>nd</sup> degree identity theft, 1<sup>st</sup> degree accomplice to identity theft, and two counts of possession of stolen property. Flook replied that he did and identified certified copies of the convictions, which the court admitted as evidence. RP 815-16. On re-direct, Flook explained that he knew about the investigation and informed the police that he was going on vacation to Australia. He returned to take care of the matter and pleaded guilty to the charges. RP 818.

Defense counsel admitted that if he thought the convictions were admissible, he would have asked Flook about them on direct examination. RP 807. Attorneys are presumed to know the law and consequently defense counsel should have known that Flook’s crimes of dishonesty were admissible for the purpose of impeachment under ER 609. Moreover, the State’s brief alerted defense counsel that it can introduce the convictions under ER 609 if Flook testified. Defense counsel therefore should have brought forth the issue of Flook’s theft and possession of stolen property convictions during motions in limine for the court to rule on admissibility.

As defense counsel later recognized, to mitigate the adverse effect of a criminal past, he should have brought the convictions to light during direct examination. Then Flook would have been prepared to explain that he took responsibility for the crimes by pleading guilty rather than be surprised on cross-examination. Alternatively, defense counsel could have advised Flook that he could offer to stipulate to the convictions instead of allowing the State to present a judgment and sentence as evidence which the jury would review. Where an attorney who practices in criminal defense should have known the rules of evidence pertaining to the admissibility of crimes of dishonesty, defense counsel's performance fell below an objective standard of reasonableness under prevailing professional norms.<sup>6</sup>

It is evident that Flook was prejudiced by counsel's deficient performance where it does not take much imagination to picture Flook's reaction before the jury when unexpectedly asked about an investigation for identity theft. When cross-examination resumed, the jury learned that Flook had been convicted of multiple counts of theft and possession of stolen property. Counsel's failure to have Flook testify first about the convictions gave the impression that Flook was less than forthcoming, which allowed the State to argue during closing whether a person who committed such

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<sup>6</sup> At trial, defense counsel stated that he has tried "350 cases." RP 83.

crimes “would come to Court and honestly testify?” RP 865-68. The way in which the convictions were revealed to the jury damaged Flook’s credibility which was crucial to his defense.

b. CPS Report

While cross-examining A.S. based on a CPS report, co-counsel asked, “When you were eight years old, did you make allegations against your uncle for regarding touching?” The State objected but the court allowed counsel to continue. RP 493-94. Counsel proceeded, stating that the CPS report indicates that “the child reports she has a massage parlor in her room. Child says she massages her --- ” The court interrupted and told counsel that it would not let her read the report if it is not in evidence. The State responded that it had no objection as long as the complete report is admitted. RP 494. Co-counsel did not move to admit the report, but instead asked A.S. several questions to which A.S. responded that she did not remember. RP 495.

Thereafter, during the direct examination of Montenegro, when the prosecutor asked her if she recalls a 2011 CPS report regarding A.S. and her uncle, she replied, “Yes.” RP 554. Montenegro explained that shortly after she married Flook his brother lived with them for a few months when A.S. was eight years old. She would walk on Flook’s and his brother’s backs to try to pop their backs. A.S. called it a massage salon and created a menu

for the different services. Someone at school became concerned when she talked about her massage salon at school and notified CPS. RP 554-58.

On cross-examination, defense counsel began asking Montenegro about the CPS report and the prosecutor objected but then said he had no objection to counsel reading the whole report into the record. RP 557-58. Defense counsel responded that he would “be happy to read the whole thing if that’s Counsel’s offer. I have to ask for Court’s guidance on this. I’ll just do whatever you want.” RP 558. The court disallowed the questioning “because she already indicated that she does not recall the report.” RP 558.

The defense cross-examination is inexplicable. Since the defense introduced the CPS report, it is reasonable to infer that the report contained information helpful to Flook’s defense. Otherwise there would be no purpose to bringing the report to the jury’s attention. The defense had two opportunities to move to admit the report when the State withdrew its objections. Co-counsel did not do so and instead conducted an inadequate cross-examination by asking A.S. questions to which she replied that she could not remember. Thereafter, defense counsel said he wanted to admit the report but deferred to the court, inviting the court to erroneously disallow the CPS report when Montenegro had just said she recalled the report.

The defense performance fell below an objective standard of reasonableness under prevailing professional norms where counsel merely referred to the report but failed to substantiate the contents of the report by moving to admit it as evidence or read it into the record. The court would have granted the motion given that the State withdrew its objection. The parties could have agreed to redactions. Defense counsels' equivocation left the jury to speculate about what the report actually contained.

The testimony disclosed that the CPS report was based on A.S. talking at school about her massage salon. A.S. invented the massage salon and created a menu of services. The CPS report provided evidence for the defense to show the jury that A.S. was exhibiting sexuality at the age of eight which could explain the nature of her allegations against Flook. Merely asking unsubstantiated questions about the report, when the jury would have seen the report had counsel moved to admit it, constitutes deficient performance that prejudiced Flook.

c. Testimony of A.S.

During pretrial motions, the court admitted evidence of other acts alleged against Flook under ER 404(b).<sup>7</sup> The court found by a

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7. Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

preponderance of the evidence that the acts occurred, the evidence is admissible for the purpose of showing lustful disposition, the evidence is relevant, and the probative value outweighs the prejudicial effect. RP 158-65.

On direct examination, the prosecutor began asking A.S. about other acts:

Q Besides this incident in the hotel, were there incidents that made you uncomfortable with Roger?

A Yes.

Q Can you describe those to the jury?

A He would --

[COUNSEL]: Objection, Your Honor. We would ask that those be one at a time.

[PROSECUTOR]: Do you want me to ask about them that way? (Indiscernible)

[COUNSEL]: Yes, Your Honor.

[PROSECUTOR]: Yeah.

THE COURT: Sustained.

Q Do you recall spanking on the butt?

[COUNSEL]: Objection, Your Honor. That's leading.

[PROSECUTOR]: Your Honor, I'm trying to avail myself of the Court's previous ruling.

THE COURT: To identify with specificity, there necessarily will be some leading. I'll allow it. Go ahead counsel.

RP 484.

The prosecutor resumed questioning, asking A.S. further leading questions with no objection from counsel:

Q Do you recall him showing you some cartoons?

A Yes

....

Q Do you recall a time when he had you sit on his lap in his car?

A Yes.

....

Q Do you recall him talking to you about your mom having sex toys?

A Yes.

....

Q Do you recall him talking about having his own porn site?

A Yes.

RP 485-87.

As a result of counsel objecting and requesting that questions about the other incidents be asked “one at a time,” she allowed the prosecutor to ask A.S. leading questions which would not have been permitted. Under ER 611(c), “[l]eading questions should not be used on the direct examination of a witness except as may be necessary to develop the witness’ testimony.” Leading questions were not necessary because A.S. was testifying about entirely separate and unrelated incidents, not one incident that needed to be developed. The questions were leading because even though the prosecutor asked yes or no questions, the questions were worded so that by permitting A.S. to answer yes or no, she would be testifying in the language of the prosecutor rather than her own. *State v. Scott*, 20 Wn.2d 696, 699, 149 P.2d 152 (1944).

Counsel’s performance fell below an objective standard of reasonableness under prevailing professional norms where there was no

conceivable reason to object on the basis that the prosecutor should ask A.S. about each alleged incident one at a time. As the court ruled, conducting questioning in such a manner necessarily calls for leading questions. Allowing the prosecutor to ask a leading question for each incident ensured that A.S. would testify about all the incidents. But for the leading questions, there is a reasonable probability that A.S. would not have recalled all the specific incidents from several years ago. There were many instances during her testimony that she could not remember details without being prompted by the prosecutor. RP 473, 480, 481, 482, 507, 508. Counsel's deficient performance prejudiced Flook where as the jury was instructed, the evidence could be considered in deciding whether Flook had a lustful disposition toward A.S. CP 111.

d. Trial Strategy or Tactics

If counsel's conduct can be characterized as "legitimate trial strategy or tactics," it cannot serve as a basis for a claim of ineffective assistance of counsel. *State v. Lord*, 117 Wn.2d 829, 883, 822 P.2d 177 (1991). There is no legitimate trial strategy or tactics in failing to mitigate the adverse effect of past crimes of dishonesty by allowing Flook to testify under direct examination that he took responsibility for his actions and pleaded guilty to the charges; in failing to move to admit the CPS report which would have been helpful to Flook's theory of the case; and objecting

during the direct examination of A.S. which allowed the prosecutor to lead A.S. into testifying about all the other bad acts.

“[I]n assessing whether a defendant has a colorable ineffective assistance of counsel claim, we examine the advocacy of the defendant’s attorney and determine if that advocacy was commensurate with that of a reasonably prudent attorney.” *State v. Greiff*, 141 Wn.2d 910, 924-25, 10 P.3d 390 (2000)(citing *United States v. Chambers*, 944 F.2d 1253, 1272 (6<sup>th</sup> Cir. 1991)). The cumulative effect of the deficient performance of counsel undermines confidence in the outcome of the trial. Flook’s conviction must be reversed because his defense counsels’ advocacy was not commensurate with that of a reasonably prudent attorney, denying Flook his constitutional and fundamental right to effective assistance of counsel.

5. REVERSAL IS REQUIRED BECAUSE CUMULATIVE ERROR DENIED FLOOK HIS CONSTITUTIONAL RIGHT TO A FAIR TRIAL AND THE PRESUMPTION OF INNOCENCE.

The Sixth Amendment to the United States Constitution and article I, section 21 of the Washington State Constitution guarantee a criminal defendant the right to a fair trial and an impartial jury. *State v. Johnson*, 152 Wn. App. at 934. “Only a fair trial is a constitutional trial.” *State v. Coles*, 28 Wn. App. 563, 573, 625 P.2d 713, *review denied*, 95 Wn.2d 1024 (1981)(citing *State v. Case*, 49 Wn.2d 66, 298 P.2d 500 (1956)). “The right

to a fair trial includes the right to the presumption of innocence. This constitutionally guaranteed presumption is the bedrock foundation in every criminal trial.” *State v. Guzman*, 129 Wn. App. 895, 900, 120 P.3d 645 (2005)(citations omitted).

Under the cumulative error doctrine, a defendant may be entitled to a new trial where errors cumulatively produced a trial that was fundamentally unfair. *In re Personal Restraint of Lord*, 123 Wn.2d at 332.

The record here establishes that reversal is required because the combined effect of the accumulation of errors produced a trial that was fundamentally unfair: (1) the trial court erred in excluding Flook’s testimony that he heard Montenegro and A.S. screaming and yelling about A.S. and J.S. engaging in sexual activity violating Flook’s right to present a defense (2) the trial erred in excluding testimony from C.S. that A.S. revealed that she had been experimenting sexually with her boyfriend violating Flook’s right to present a defense (3) Montenegro’s improper opinion testimony violated Flook’s right to a jury trial (4) Sheriff Myers’ improper opinion testimony violated Flook’s right to a jury trial (5) the trial court erred in overruling defense counsel’s objection to Sheriff Myers’ improper opinion testimony (5) defense counsel’s failure to have Flook testify on direct examination about his convictions to mitigate the adverse effect of a criminal past denied Flook his right to effective assistance of

counsel (6) defense counsel's failure to move to admit the CPS report helpful to the defense denied Flook his right to effective assistance of counsel (7) defense counsel's objection which allowed the State to ask A.S. about all the other bad acts denied Flook his right to effective assistance of counsel.

Reversal is required because cumulative error denied Flook his constitutional right to a fair trial and the presumption of innocence.

6. TWO COMMUNITY CUSTODY CONDITIONS MUST BE STRICKEN BECAUSE THEY ARE UNCONSTITUTIONALLY VAGUE.

The Fourteenth Amendment to the United States Constitution and article I, section 3 of the Washington Constitution require that citizens be afforded fair warning of proscribed conduct. *State v. Nguyen*, 191 Wn.2d 671, 425 P.3d 847 (2018). A community custody condition is unconstitutionally vague if it does not define the criminal offense with sufficient definitiveness that ordinary people can understand what conduct is proscribed or does not provide ascertainable standards of guilt to protect against arbitrary enforcement. 191 Wn.2d at 671.

In *State v. Casimiro*, 8 Wn. App.2d 245, 251, 438 P.3d 137 (2019), this Court held that a community custody condition requiring the defendant to notify the corrections officer and sex offender treatment therapist "of any

romantic or sexual relationship” must be stricken because the term is highly subjective, citing *Nguyen*.

Here, the trial court imposed numerous community custody conditions including:

17. Shall report to his supervising officer prior to entering into any *romantic relationship* with any person who has minor aged children.
18. He shall report his criminal history to any person, with minor age children, with whom he is going to have a *romantic relationship*.

CP 177 (emphasis added).

Pursuant to *Casimiro* and *Nguyen*, a remand is required for the court to strike the two community custody conditions. *See also* this Court’s unpublished opinion in *State v. Landeros*, 5 Wn. App. 1005 (2018)(the term romantic relationship is unconstitutionally vague).

F. CONCLUSION

The jury was instructed that if after considering all of the evidence or lack of evidence “you have an abiding belief in the truth of the charge, you are satisfied beyond a reasonable doubt.” Absent the errors in this case, the jury could not have found Flook guilty beyond a reasonable doubt.

This Court should reverse Flook’s conviction.

DATED this 19<sup>th</sup> day of August, 2019.

Respectfully submitted,

/s/ Valerie Marushige

VALERIE MARUSHIGE

WSBA No. 25851

Attorney for Appellant, Roger William Flook, Jr.

**DECLARATION OF SERVICE**

On this day, the undersigned sent by email, a copy of the document to which this declaration is attached to the Asotin County Prosecutor's Office at [lwebber@co.asotin.wa.us](mailto:lwebber@co.asotin.wa.us) by agreement of the parties and by U.S. Mail to Roger William Flook, Jr., DOC # 841039, Airway Heights Corrections Center, P.O. Box 1899, Airway Heights, Washington 99001-1899.

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

DATED this 19<sup>th</sup> day of August, 2019

/s/ Valerie Marushige  
VALERIE MARUSHIGE  
Attorney at Law  
WSBA No. 25851

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