

71330-2

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No. 71330-2-I

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

STATE OF WASHINGTON,

Respondent,

v.

ANTON CURTIS JOHNSON,

Appellant.

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

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The convictions on counts two and three violate Mr. Johnson's right to notice, to sufficiency of the evidence, and to a fair jury trial guaranteed by the Fourteenth Amendment to the United States Constitution and article I, sections 3 and 22 of the Washington Constitution.

2. The trial court erred in denying Mr. Johnson's motion for judgment of acquittal on counts two and three.

3. Mr. Johnson was deprived of his right to the effective assistance of counsel in violation of the Sixth and Fourteenth Amendments and article I, section 22.

4. The sentencing court exceeded its statutory authority by imposing community custody in addition to a 60-month term of confinement.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. The Sixth and Fourteenth Amendments and article I, sections 3 and 22 guarantee the rights to notice, to a jury finding beyond a reasonable doubt of the crime charged, and to a fair trial. Do the convictions on counts two and three violate these constitutional provisions because the State introduced evidence of two incidents which could not have

constituted the charged crimes as a matter of law and the prosecutor in closing argument told the jury it could convict based on those incidents?

2. Did the trial court err in denying Mr. Johnson's motion for judgment of acquittal on counts two and three based on the judge's misapprehension that the acts the prosecutor elected in closing argument were charged in the information?

3. The Sixth and Fourteenth Amendments and article I, section 22 guarantee the right to the effective assistance of counsel. Hearsay is inadmissible, as are statements of opinion on guilt and credibility, and evidence of unsubstantiated prior acts. Was Mr. Johnson deprived of his constitutional right to the effective assistance of counsel when his attorney failed to object to the admission of several hearsay statements, a statement of opinion on credibility, and an unsubstantiated allegation of a much more serious crime than those alleged in the information?

4. Although RCW 9.94A.701(a)(1) provides for a term of 36 months of community custody for third-degree rape of a child, RCW 9.94A.701(a)(9) directs that the term of community custody is to be reduced as necessary to ensure a total sentence does not exceed the statutory maximum. The statutory maximum for third-degree rape of a child is 60 months. Did the sentencing court exceed its statutory authority

by imposing community custody in addition to a 60-month term of confinement?

C. STATEMENT OF THE CASE

Anton Johnson and Michelle Willis have had a romantic relationship for many years. RP (10/29/13) at 194-229. Between 2009 and 2012, the two lived on and off with Ms. Willis's daughter, DeQuenna King, and Ms. King's six daughters. RP (10/29/13) at 114-122. The living situation was mutually beneficial. RP (10/29/13) at 213. While Ms. King worked, Mr. Johnson and Ms. Willis cooked, cleaned, performed home repairs, did the grocery shopping, and took care of the children. RP (10/29/13) at 213-14.

In August of 2011, Ms. Willis became ill and had to have her thyroid removed. RP (10/29/13) at 199. Radiation treatment followed, during which Ms. Willis had to be sequestered in her bedroom. RP (10/29/13) at 199. Mr. Johnson cooked and delivered Ms. Willis's meals to her during that period. RP (10/29/13) at 218.

In March of 2012, Ms. King's oldest daughter, K.K., discovered she was pregnant. RP (10/29/13) at 121, 259. K.K. had been dating a boy named Layth, and she told the doctor her pregnancy was the result of consensual sex with a same-age partner. RP (10/29/13) at 287-88. K.K. got an abortion the same month. RP (10/29/13) at 262-63.

In the meantime, Ms. Willis recovered from her illness, and she and Mr. Johnson moved out of Ms. King's house in June or July of 2012. RP (10/29/13) at 125.

In February or March of 2013, Ms. King's second-oldest daughter, Takeysha, told Ms. King that K.K. said that Mr. Johnson caused K.K.'s pregnancy a year earlier. RP (10/29/13) at 126. Ms. King relayed the accusation to Ms. Willis, and K.K. told both of them that it was true. RP (10/29/13) at 126, 208-09. Ms. King called the police, and the State eventually charged Mr. Johnson with three counts of third-degree rape of a child. The State alleged that the incidents occurred between September 15, 2011 (K.K.'s 14th birthday) and April 1, 2012. CP 1-2.

At trial, various family members all testified about what they and other family members had previously said to each other about what happened. Ms. Willis testified that she said she believed K.K., and an officer testified that Takeysha said that Mr. Johnson and K.K. had sex when K.K. was 11 years old. There was no other evidence that such an act occurred when K.K. was that age. Defense counsel did not object to most of this evidence. RP (10/29/13) at 126, 152-55, 180-82, 208-09, 233, 270.

In addition to introducing some evidence of sex acts within the charging period, the State introduced evidence of two acts that occurred when K.K. was 13 years old. RP (10/29/13) at 252-53, 275, 278. The

prosecutor repeatedly told the jury it could convict Mr. Johnson of two of the three counts charged based on these acts. RP (10/30/13) at 330-32.

The jury returned guilty verdicts on all three counts. CP 16. Mr. Johnson moved for dismissal of counts two and three on the basis that there was not sufficient evidence of separate and distinct counts within the charging period. CP 30-32. The trial court denied the motion, relying on the same acts the prosecutor had referenced in closing argument. RP (12/13/13) at 6.

D. ARGUMENT

1. The convictions on counts two and three violate Mr. Johnson's constitutional rights to notice, to sufficiency of the evidence, and to a fair jury trial because the prosecutor elected acts which were outside the charging period and which did not constitute third-degree rape of a child as a matter of law.

- a. The state and federal constitutions guarantee the rights to notice, to proof beyond a reasonable doubt, to a unanimous jury finding of the elements of the crimes charged, and to a fair trial.

The state and federal constitutions guarantee the right to have the State prove each element of the crime charged beyond a reasonable doubt. *Apprendi v. New Jersey*, 530 U.S. 466, 490, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000); *In re Winship*, 397 U.S. 358, 364, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970). A criminal defendant's fundamental right to due process is violated when a conviction is based upon insufficient evidence. *Id.*; U.S.

Const. amend. XIV; Const. art. I, § 3; *City of Seattle v. Slack*, 113 Wn.2d 850, 859, 784 P.2d 494 (1989).

The state and federal constitutions also guarantee the right to notice of the specific crime or crimes charged. U.S. Const. amends. VI, XIV; Const. art. I, § 22; *State v. Pelkey*, 109 Wn.2d 484, 487, 745 P.2d 854 (1987). “An accused person has a constitutional right to be informed of the charge he is to meet at trial and cannot be tried for a crime not charged.” *State v. Jain*, 151 Wn. App. 117, 121, 210 P.3d 1061 (2009).

A constitutional corollary to this rule is that “a defendant may be convicted only when a unanimous jury concludes that the criminal act *charged in the information* has been committed.” *State v. Kitchen*, 110 Wn.2d 403, 409, 756 P.2d 105 (1988) (emphasis added); U.S. Const. amends. VI, XIV; Const. art. I, § 22. Finally, both the state and federal constitutions guarantee the right to a fair jury trial. U.S. Const. amends. VI, XIV; Const. art. I, §§ 3, 22; *State v. Monday*, 171 Wn.2d 667, 676, 257 P.3d 551 (2011).

As explained below, the convictions on counts two and three violate these fundamental constitutional guarantees.

- b. The convictions on counts two and three violate Mr. Johnson's constitutional rights because the State presented evidence of acts that were not charged and could not legally constitute third-degree rape of a child, and the prosecutor elected those acts in its closing argument to the jury.

The State charged Mr. Johnson with three counts of rape of a child in the third degree. CP 1-2. For each count, the State alleged:

That the defendant ANTON CURTIS JOHNSON in King County, Washington, during a period of time intervening between September 15, 2011 through April 1, 2012, being at least 48 months older than K.K. (DOB 9/15/97), had sexual intercourse with K.K. (DOB 9/15/97), who was 14 years old and was not married to and not in a state registered domestic partnership with the defendant;

Contrary to RCW 9A.44.079, and against the peace and dignity of the State of Washington.

CP 1, 2. The charging period began on K.K.'s fourteenth birthday, September 15, 2011, when she was in eighth grade. CP 1-2; RP (10/29/13) 239-43 (K.K. confirms her birthdate is 9/15/97, and states that she is currently 16 years old and in 10th grade, and was in sixth grade when she was 12 years old).

Although the State presented evidence of alleged acts of sexual intercourse that occurred during this charging period, the State also presented evidence of two alleged acts of sexual intercourse that occurred when K.K. was in seventh grade, and elected these acts in its closing argument. These acts not only occurred before the charging period, but

could not have constituted third-degree child rape as a matter of law, because that crime requires that the victim be at least 14 years of age. *See* RCW 9A.44.079(1) (“A person is guilty of rape of a child in the third degree when the person has sexual intercourse with another who is at least fourteen years old but less than sixteen years old and not married to the perpetrator and the perpetrator is at least forty-eight months older than the victim”).

The acts in question were described as the “counter” incident, and the “under-the-covers” incident. K.K. – who was the only witness who testified about these incidents – described the counter incident as follows:

Q: There was another time that you mentioned in the interview ... that had to do with the counter. Do you remember that incident?

A: A counter, yes.

Q: Tell the jury about that time?

A: **I was in 7th grade.**

Me and Anton had went in the kitchen. He put me on the counter and he opened my legs and then he like put it in, in like, I felt like a pop, it hurt a lot.

Then I just like pushed him back. Then I hop off the counter and kind of said like somebody is coming or something.

RP (10/29/13) at 253-54 (emphasis added). K.K. described the under-the-covers incident as follows:

Q: All Right. You mentioned in the interview with the defendant's lawyer a time when Anton said something like "I want to taste you." Do you remember that incident?

A: Yes. **I was in 7th grade and we lived on Fir Street.** I was in the room with Takeysha. She was like on her phone. Everyone else was in the living room, watching TV. I was on like on my phone. He had told me that he wanted to taste me. It was like an awkward moment.

So, he like, I took my panties off and he like went under the covers and then he did it. Then he told me like watch if anybody was like coming or something.

Q: Did you say Takeysha was in the room at the time?

A: Yes.

Q: What was she doing?

A: She was on her phone.

RP (10/29/13) at 252 (emphasis added).

These incidents both occurred before the incident that K.K. considered to be the "first time" she "had sex" with Mr. Johnson. She described the "first time" as follows:

Q: How old were you, if you remember, about the first time you had sex?

A: **I was 14.**

Q: Tell the jury everything that you remember about that first time, from the beginning to the end.

A: I had came out of the bathroom and I was like laying down. He was sitting on the couch watching TV, I was like, getting ready to like to go bed. He had turned off

the TV and rolled me over and then we started kissing.
Then he like – put it inside of me.

RP (10/29/13) at 249-50. This incident occurred after K.K. and her family moved to the house on Brighton Street, which was their residence during the charging period. RP (10/29/13) at 120, 251. K.K. also said she had sex with Mr. Johnson at least 15 times after this incident, but that she could not remember dates or specific details about those acts. RP (10/29/13) at 273, 294-95.

K.K. never changed her testimony regarding the timing of the counter incident or the under-the-covers incident, and no one else testified about these alleged acts. RP (10/29/13) at 275 (K.K. confirms they lived on Fir Street before Brighton Street); RP (10/29/13) at 278 (without prompting, K.K. reiterates that the under-the-covers incident occurred when they lived on Fir Street). Thus, the *only* evidence the jury heard was that both of these incidents occurred when K.K. was in seventh grade – which was before the charging period and before she turned 14 years old.

Nevertheless, the prosecutor in closing argument urged the jury to find Mr. Johnson guilty of two of the three counts based on these two alleged incidents, wrongly claiming they occurred during the charging period when K.K. lived on Brighton Street. RP (10/30/13) at 332. After

properly explaining the unanimity requirement and the *Petrich*¹ instruction, the prosecutor said:

I suggest that there is two ways that you can [comply with the unanimity requirement] in this case.

[K.K.] told you that between those charging dates they were on Brighton Street, the defendant had sex with her, she believes roughly 15 times. She described to you with specific detail three separate incidents and two of them I just mentioned. The first was that first time in the living room. **The second time was a time on the counter. The third was a time when he had oral sex with her under the blanket as Takeysha played with her phone on the bed across the room.**

RP (10/30/13) at 330-32 (emphasis added). Thus, two of the three acts the prosecutor initially elected in closing argument did not occur in the charging period and did not constitute third-degree rape of a child as a matter of law.

The prosecutor then suggested an alternative way of complying with the unanimity requirement, which still relied on the alleged acts that occurred before the charging period and could not constitute third-degree child rape:

Then [K.K.] described to you all of the incidents that occurred in the den. She said that she thought that there were 10 or 15 of those. You can either agree, for example, that Count I has been proven by your unanimous agreement on the first time he ever had sex with her.

¹ *State v. Petrich*, 101 Wn.2d 566, 683 P.2d 173 (1984); CP 25, 27-28.

Count II is proven by your unanimous agreement about the time that she described on the counter.

Count III is described by your unanimous agreement that at least one time he had sexual intercourse with her in that den, **or you agree with that occasion that [s]he described, which occurred underneath the blanket in the room with Takeysha.**

RP (10/30/13) at 332.

The State may claim that because it did not provide special verdict forms, no one knows which acts the jury relied on and the jury may have chosen three incidents from within the charging period notwithstanding the prosecutor's repeated encouragement to rely on the counter and under-the-covers incidents. Any such argument should be rejected. The absence of special verdict forms should be held against the State. Otherwise a prosecutor could present evidence of acts not charged and elect acts not charged during closing argument, thereby violating a defendant's rights to due process and a fair jury trial, yet claim that violation is not redressable absent special verdict forms, thereby violating a defendant's constitutional right to appeal. Const. art. I, § 22.

Even absent special verdict forms, there can be little doubt that the jury relied on these crimes not charged. First, as demonstrated above, these two acts were the focus of the prosecutor's closing argument explaining the unanimity requirement. Second, these two acts were the

only acts other than the first act in the Brighton Street house that was described with any detail. Third, even the judge was deceived by the prosecutor's argument and improperly relied on these acts when denying Mr. Johnson's motion for judgment of acquittal on counts 2 and 3. He said, "The jury was properly instructed as to the need to ... have a unanimous finding as to the factual basis for each of the three counts. **I think the prosecutor suggested different locations or different occasions to them and [the] framework.**" RP (12/13/13) at 6 (emphasis added).

In sum, the convictions on counts two and three are unconstitutional, and this Court should reverse.

- c. The remedy is reversal and dismissal with prejudice; the State may not file new charges based on acts it already relied on in this trial.

The remedy for the unconstitutional convictions on counts two and three is reversal of the convictions on those counts and dismissal of the charges with prejudice to the State's ability to re-file. Principles of double jeopardy and mandatory joinder preclude re-filing charges of third-degree rape of a child, or filing new charges of second-degree rape of a child for the two incidents on which the prosecutor wrongly relied in this case.

U.S. Const. amend. V; CrR 4.3; *see State v. DeVries*, 149 Wn.2d 842, 853, 72 P.3d 748 (2003) ("A defendant whose conviction has been reversed due

to insufficient evidence cannot be retried.”); *State v. Dallas*, 126 Wn.2d 324, 328, 892 P.2d 1082 (1995) (dismissal is with prejudice where prosecutor charged wrong crime to conform to the evidence); *State v. Heaven*, 127 Wn. App. 156, 110 P.3d 835 (2005) (after jury acquitted defendant of two counts of child molestation and hung on a third count, double jeopardy precluded retrial on the third count because record did not indicate specific acts on which jury acquitted, resulting in possibility that defendant would be retried on act for which jeopardy had attached).

2. Mr. Johnson was deprived of his constitutional right to the effective assistance of counsel when his attorney failed to object to a substantial amount of inadmissible evidence.

- a. Mr. Johnson had a constitutional right to the effective assistance of counsel.

A person accused of a crime has a constitutional right to the effective assistance of counsel. U.S. Const. amend. VI; Const. art. I, § 22; *United States v. Cronin*, 466 U.S. 648, 654, 104 S.Ct. 2039, 80 L.Ed.2d 657 (1984); *State v. Hendrickson*, 129 Wn.2d 61, 77, 917 P.2d 563 (1996). “The right to counsel plays a crucial role in the adversarial system embodied in the Sixth Amendment, since access to counsel’s skill and knowledge is necessary to accord defendants the ample opportunity to meet the case of the prosecution to which they are entitled.” *Strickland v. Washington*, 466 U.S. 668, 685, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984).

A new trial should be granted based on ineffective assistance of counsel if (1) counsel's performance at trial was deficient, and (2) the deficient performance prejudiced the defense. *Strickland*, 466 U.S. at 687. As to the first inquiry (performance), an attorney renders constitutionally inadequate representation when he or she engages in conduct for which there is no legitimate strategic or tactical basis. *State v. McFarland*, 127 Wn.2d 322, 335-36, 899 P.2d 1251 (1998). A decision is not permissibly tactical or strategic if it is not reasonable. *Roe v. Flores-Ortega*, 528 U.S. 470, 481, 120 S.Ct. 1029, 145 L.Ed.2d 985 (2000).

As to the second inquiry (prejudice), if there is a reasonable probability that but for counsel's inadequate performance, the result would have been different, prejudice is established and reversal is required. *Strickland*, 466 U.S. at 694; *Hendrickson*, 129 Wn.2d at 78. A reasonable probability "is a probability sufficient to undermine confidence in the outcome." *Strickland*, 466 U.S. at 694; *State v. Thomas*, 109 Wn.2d 222, 226, 743 P.2d 816 (1987). It is a lower standard than the "more likely than not" standard. *Thomas*, 109 Wn.2d at 226.

This Court has explained the application of the *Strickland* standard to the context of an attorney's failure to object to inadmissible evidence as follows:

More specifically, where the defendant claims ineffective assistance based on counsel's failure to challenge the admission of evidence, the defendant must show (1) an absence of legitimate strategic or tactical reasons supporting the challenged conduct; (2) that an objection to the evidence would likely have been sustained; and (3) that the result of the trial would have been different had the evidence not been admitted.

State v. Saunders, 91 Wn. App. 575, 578, 958 P.2d 364 (1998) (internal citations omitted).

- b. The rules of evidence prohibit hearsay testimony, opinions on credibility, and allegations of unproved prior acts.

“‘Hearsay’ is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.” ER 801 (c). Hearsay is not admissible unless an exception applies. ER 802. Hearsay is inadmissible regardless of whether the declarant testifies at trial and is subject to cross-examination. *See Crawford v. Washington*, 541 U.S. 36, 51, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004) (explaining that testimony can violate the prohibition against hearsay without violating the confrontation clause, and vice versa). “An out-of-court-statement is hearsay when offered to prove the truth of the matter asserted, even if the statement was made and acknowledged by someone who is an in-court witness at trial.” *State v. Clinkenbeard*, 130 Wn. App. 552, 569, 123 P.3d 872 (2005).

Statements of opinion on guilt and credibility are also inadmissible. The state and federal constitutions guarantee the right to trial by jury. U.S. Const. amend. VI; Const. art. I, §§ 21, 22. “The right to have factual questions decided by the jury is crucial to the right to trial by jury.” *State v. Montgomery*, 163 Wn.2d 577, 590, 183 P.3d 267 (2008). Because it is the jury’s role to decide factual questions, witnesses “may not testify as to the guilt of defendants, either directly or by inference.” *State v. Olmedo*, 112 Wn. App. 525, 530, 49 P.3d 960 (2002); *accord Montgomery*, 163 Wn.2d at 591. Additionally, “[a] witness’s expression of personal belief about the veracity of another witness is inappropriate opinion testimony in criminal trials.” *State v. Perez-Valdez*, 172 Wn.2d 808, 817, 265 P.3d 853 (2011).

Finally, unsubstantiated allegations of prior bad acts are inadmissible. ER 404(b) provides:

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.

In order to admit prior-acts evidence, a court must (1) find by a preponderance of the evidence the misconduct occurred, (2) identify the purpose of admitting the evidence, (3) determine the relevance of the

evidence to prove an element of the crime, and (4) weigh the probative value against the prejudicial effect of the evidence. *State v. Fisher*, 165 Wn.2d 727, 745, 202 P.3d 937 (2009). In other words, evidence of the alleged prior act is not admissible if there is not sufficient proof that it in fact occurred, or if it is being introduced to show propensity to commit such acts, or if it is either not relevant or substantially more prejudicial than probative. *Id.*

- c. Mr. Johnson was deprived of his constitutional right to the effective assistance of counsel when his attorney failed to object to improper hearsay statements, opinion testimony, and allegations of unproved prior acts.

Mr. Johnson's attorney's performance was deficient when he failed to object to countless hearsay statements during the testimony of DeQuenna King, Takeysa King, K.K., and Michelle Willis; when he affirmatively opened the door to hearsay statements during the testimony of Officer Beseler; when he failed to object to improper opinions of credibility during Michelle Willis's testimony; and when he failed to object to unsubstantiated allegations that Mr. Johnson and K.K had sex when she was 11 years old.

Specific statements for which there were no objections include the following hearsay statements by DeQuenna King:

A: So then, when I got off the phone I asked, I brought her in my room and I asked her what was going on.

Q: Asked who?

A: Takeysha, asked her what was going on and she told me that [K.K.] told her that she wasn't really pregnant by Layth. It was Anton's baby.

...

Q: Did you ever, after Takeysha told you that [K.K.] said it was Anton that she was pregnant by, did you ask [K.K.] whether or not that was true?

A: I did. After I talked to Takeysha I brought [K.K.] into the room and I asked her and said, yes, it was true.

RP (10/29/13) at 126.

Counsel failed to object to the following hearsay statements by

Takeysha King:

A: Like, I could hear them, but they were like arguments like, "you got me pregnant." She used to have the argument just like --

Q: When did you learn that Layth was actually not the father of [K.K.]'s baby?

A: When she told me.

...

A: She was doing my hair, and then we were talking and then she said, "I have something to tell you." I was like, "what?" Then she said, the baby that she was about to have was Anton's.

...

Q: What did you tell [your mother]?

A: I said, "Anton hurt [K.K.]."

Q: Did you get more specific than that?

A: I said, "the baby that she had, it was his."

RP (10/29/13) at 152-53, 155.

Counsel similarly failed to object to hearsay statements by Michelle Willis, as well as an opinion on credibility and guilt:

A: The text said, "ask your nigger how long he been sleeping with your granddaughter."

...

Q: Did you ever ask [K.K.] about it, whether it was true or not?

...

A: I asked her, I said, "well, you know, I wanted her to know that no matter – I support you." Because I love my grandchildren. They are my life. So I wanted her to know that I am not calling her to scold her or to, you know, talk bad to her. I just wanted to know the truth.

I said, "did it happen?"

She said, "yes."

...

I said, "well, how long has this been going on?"

She said, "for a while." So we just talked. I wanted her to know that I love her. I am not mad at her. I believe her.

...

RP (10/29/13) at 208-09. On redirect examination, Mr. Johnson's attorney

did not object to the following hearsay:

Q: You asked [K.K.] at that point whether those things were true?

A: Yes.

Q: And she said, yes, they were?

A: Yes.

RP (10/29/13) at 152-53, 155. K.K. herself testified that she had told both her sister and her mother that the baby she aborted was Mr. Johnson's. RP (10/29/13) at 268-70. There was no hearsay objection to these statements. RP (10/29/13) at 268-70.

Finally, defense counsel opened the door to extensive hearsay during Officer Eric Beseler's testimony. When the officer mentioned that he interviewed DeQuenna King, the prosecutor said, "Ok, I am not allowed to ask you what she said." RP (10/29/13) at 178. The officer then testified that he also interviewed Takeysha, but did not relate her statements to the jury. RP (10/29/13) at 178.

On cross-examination, defense counsel said, "With regard to one statement in the report after speaking with Takeysha, did you learn that Takeysha and the victim, [K.K.], were talking about older men being interested in them at the basketball court? Is that one of the things that you remember from Takeysha?" RP (10/29/13) at 180-81. The officer responded that he thought he heard that from both Takeysha and her mother. Defense counsel reiterated, "That is the gist that Takeysha and [K.K.] were sharing secrets about older men?" The officer said, "Yes."

RP (10/29/13) at 181. Eliciting this hearsay was the extent of the cross-examination. RP (10/29/13) at 180-81.

Since defense counsel opened the door to hearsay statements, the prosecutor on redirect examination asked the officer to recount everything Takeysha told him. He then read his police report to the jury:

[Takeysha] explained when she and her sister were at the basketball court, the talk turned to older men being interested in them.

[K.K.] confided slowly that Anton had showed an interest in her sexually. By the time that they returned home, [K.K.] was braiding Takeysha's hair and [K.K.] had said to have divulged that she had begun having sex with Anton when she was 11 years old. The first time was said to have occurred in the back room while other family members slept after Anton told her that he found her attractive saying that she was quote beautiful unquote and quote had a nice booty. Takeysha stated that [K.K.] further stated that they continued to have sex on multiple other occasions.

RP (10/29/13) at 181-82. The officer's testimony included not only hearsay, but also a completely unsubstantiated and extraordinarily prejudicial accusation of sexual intercourse beginning when K.K. was 11 years old. *Id.*

The failure to object to such a significant amount of inadmissible evidence constituted deficient performance. The failure was not tactical as demonstrated by the fact that counsel did object twice on hearsay grounds to statements not listed above. RP (10/29/13) at 127, 234. Nor was it

reasonable. “Reasonable conduct for an attorney includes carrying out the duty to research the relevant law.” *State v. Kyлло*, 166 Wn.2d 856, 862, 215 P.3d 177 (2009). Had counsel researched the law discussed above, he would have objected on the grounds that the statements were hearsay, were improper opinions on guilt and credibility, and were allegations of unproved prior acts.

The deficiency prejudiced Mr. Johnson because there is a reasonable probability that the trial court would have excluded the statements had the proper objection been lodged. The State could not have proposed a non-hearsay purpose for introducing the statements, because if not offered for their truth, they would not have been relevant. Furthermore, it is well-settled that witnesses may not offer opinions on the credibility of other witnesses or on the ultimate issue of guilt or innocence, and that unsubstantiated allegations of prior acts are inadmissible. Had counsel objected, the evidence would have been excluded.

Absent all of the above objectionable evidence, there is a reasonable probability that the outcome of the trial would have been materially affected. “[W]here there is a risk of prejudice and no way to know what value the jury placed upon the improperly admitted evidence, a new trial is necessary.” *Salas v. Hi-Tech Erectors*, 168 Wn. 2d 664, 673, 230 P.3d 583 (2010). The issue in this case was whether K.K. was telling

the truth regarding alleged sexual incidents with Mr. Johnson. In light of the fact that she told the doctor something other than what she told the jury, a rational factfinder might doubt her testimony – until they heard multiple other witnesses repeat her statements, vouch for her credibility, and raise the specter of more egregious misconduct. The failure to object to significant amounts of inadmissible, prejudicial evidence materially affected the outcome, requiring reversal and remand for a new trial. *Salas*, 168 Wn.2d at 673.

3. The sentencing court exceeded its authority by imposing community custody in addition to the statutory maximum term of confinement.

Although RCW 9.94A.701(a)(1) provides for a term of 36 months of community custody for third-degree rape of a child, RCW 9.94A.701(a)(9) directs that the term of community custody is to be reduced as necessary to ensure a total sentence does not exceed the statutory maximum. The statutory maximum for third-degree rape of a child is 60 months. RCW 9A.44.079; RCW 9A.20.021; CP 34. Thus, if 60 months of confinement is imposed, no community custody may be ordered. *Id.*; *State v. Boyd*, 174 Wn.2d 470, 473, 275 P.3d 321 (2012).

The sentencing court imposed 60 months of confinement upon Mr. Johnson. CP 36. During the sentencing hearing, the prosecutor requested, and the court orally imposed, 36 months of community custody in addition

to the 60 months of confinement. RP (12/13/13) at 9, 14. This was improper. RCW 9.94A.701(a).

The written judgment and sentence is also improper. It states that community custody “is ordered for any period of time the defendant is released from total confinement before the expiration of the maximum sentence.” CP 37. The statute requires imposition of a fixed term of community custody, reduced as necessary in light of the statutory maximum. RCW 9.94A.701(a). It does not allow a sentencing court to impose a variable term depending on the length of earned early release. *Id.*; *Boyd*, 174 Wn.2d at 471-73. This Court should reverse and remand with instructions to strike the community custody portion of the judgment.

E. CONCLUSION

Johnson asks this Court to reverse his convictions on counts two and three and dismiss those charges with prejudice, and to reverse the conviction on count one and remand for a new trial.

DATED this 4th day of August, 2014.

Respectfully submitted,


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Washington Appellate Project
Attorney for Appellant

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

STATE OF WASHINGTON,)	
)	
Respondent,)	
)	
v.)	NO. 71330-2-I
)	
ANTON JOHNSON,)	
)	
Appellant.)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 5TH DAY OF AUGUST, 2014, I CAUSED THE ORIGINAL **OPENING BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS – DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

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<input checked="" type="checkbox"/> ANTON JOHNSON 881668 AIRWAY HEIGHTS CORRECTIONS CENTER PO BOX 1899 AIRWAY HEIGHTS, WA 99001	(X) () ()	U.S. MAIL HAND DELIVERY _____

SIGNED IN SEATTLE, WASHINGTON THIS 5TH DAY OF AUGUST, 2014.

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