

No. 73805-4-I

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

STATE OF WASHINGTON,

Respondent,

v.

MARCEL CERDAN SAMPSON,

Appellant.

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Court of Appeals
Division I
State of Washington

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

APPELLANT'S OPENING BRIEF

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A. ASSIGNMENTS OF ERROR

1. The trial court misapplied the evidence rules and violated Sampson's constitutional right to present a defense by refusing to allow his expert to testify.

2. The trial court erred in admitting child hearsay that did not conform to the requirements of the child hearsay statute.

3. The trial court erred in admitting hearsay that did not fall under any exception to the hearsay rule.

4. The trial court violated Sampson's Sixth Amendment right to compel the testimony of two witnesses in his defense.

5. The trial court erred in replaying audiovisual recordings of the children's testimonies for the jury during deliberations.

6. Cumulative errors deprived Sampson of a fair trial.

7. Sampson's "three-strike" sentence violates the Equal Protection Clause.

8. If the State substantially prevails, this Court should decline to award appellate costs due to Sampson's inability to pay.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Expert testimony is admissible if it is helpful to the jury and addresses matters outside common understanding. Here, Sampson

proposed the testimony of an expert on memory and child interview techniques, who had analyzed the children's allegations and would explain why specific characteristics of the statements suggested they were not the product of actual memories. Courts recognize such matters are outside common understanding. Did the trial court abuse its discretion in refusing to allow the testimony?

2. An accused has a constitutional right to present evidence relevant to his defense. A court may exclude evidence relevant to the defense only if the State shows it is so prejudicial that it would disrupt the fact-finding process of the trial. Here, Sampson offered expert testimony that was relevant to his defense that the children's memories were not accurate. Did the trial court violate his constitutional right to present a defense by refusing to allow the testimony?

3. Children's hearsay statements are admissible if they conform to the requirements of the child hearsay statute. The statements must be about events that allegedly happened to the declarant, and not to another child. Did the court violate the statute by admitting hearsay statements recounting events that allegedly happened to another child?

4. An out-of-court statement offered to prove the truth of the matter asserted is not admissible unless it falls under an exception to

the hearsay rule. Did the court err in admitting a damaging hearsay statement that did not fall under any exception to the hearsay rule?

5. An accused has a constitutional right to compel the testimony of witnesses material to his defense. Did the trial court violate this right by refusing to compel the testimony of two material witnesses?

6. A trial court may not replay an audiovisual recording of a complaining witness' testimony during jury deliberations if doing so places undue emphasis on the testimony. Here, the trial court replayed audiovisual recordings of the complaining witnesses' out-of-court testimonial statements. Did the court impermissibly place prejudicial emphasis on that testimony, where the only evidence of sexual abuse consisted of the children's in-court and out-of-court statements?

7. Did multiple harmful errors occurring throughout Sampson's trial cumulatively deprive him of a fair trial?

8. Did the arbitrary labelling of a persistent offender finding as a "sentencing factor" that need not be proved to a jury beyond a reasonable doubt violate the Equal Protection Clause?

9. Where Sampson is indigent and unable to pay legal financial obligations, should this Court deny appellate costs if the State substantially prevails?

C. STATEMENT OF THE CASE

Marcel Sampson is a 38-year-old man who enjoys the company of women. While serving time in prison, he formed relationships with several different women. He talked to them on the telephone and at least one of them visited him in prison. 6/17/15RP 405-10. Sampson was released in April 2008. 6/17/15RP 402, 413.

After Sampson's release, he started spending the night regularly at the home of one of his girlfriends, Janine Thornton. 6/09/15RP 87-88; 6/17/15RP 415. Thornton was in love with him and they discussed marriage. 6/09/15RP 83-84. But while Sampson was staying with Thornton, he was engaging in a sexual relationship with another girlfriend, Fuhyda Rogers. 6/17/15RP 425. Sampson left Thornton for Rogers after about two months. 6/09/15RP 104-07; 6/17/15RP 417.

Sampson lived with Rogers from July to November 2008. 6/10/15RP 90. Rogers became pregnant and the two discussed marriage. 6/10/15RP 88, 91. But while Sampson was living with Rogers, he was engaging in sexual relationships with quite a few other women. 6/17/15RP 432.

Sampson told all of his girlfriends they were his main girlfriend, but he did not mean it. He did not want them to know he was cheating

with other women—he wanted to keep them all. 6/17/15RP 435-36. Nonetheless, his girlfriends found out about each other and became angry. They talked to each other about him. 6/17/15RP 425-27, 444-45. When Thornton found out about Rogers, she called her on the telephone, to let her know she was not his only girlfriend. 6/10/15RP 121-22; 6/11/15a.m.RP 50.

Rogers found out Sampson was cheating on her with Thornton and several other women. 6/10/15RP 152; 6/17/15RP 436. She became angry and tried to bash in the car window of one of his girlfriends. 6/17/15RP 438. Another time, after he spent his birthday with another girlfriend, she tried to hit him. 6/17/15RP 452-56. Rogers and Sampson had another altercation in December 2008, after he was dropped off at her house by one of his girlfriends. 6/17/15RP 457-59. Sampson and Rogers broke up due to his infidelity and because he hit her during an argument. 6/10/15RP 87, 100.

One day in March 2009, Sampson stopped by to visit Rogers. He hoped to reconcile with her. 6/10/15RP 106. He used the bathroom just before before Rogers's 11-year-old daughter P.W. entered the bathroom to take a shower. 6/10/15RP 104-05. Rogers later looked through Sampson's phone, looking for evidence of his continued

infidelity. She said she found a video of P.W. in the bathroom taking off her clothing as she got ready to take a shower. 6/10/15RP 106-08. Rogers called the police. 6/10/15RP 111. The police recovered the phone and analyzed it but found no such video. 6/15/15RP 129.

After allegedly finding the video, Rogers decided to investigate Sampson's prior conviction. Sampson had been convicted in 2007 of a sex offense involving a 14-year-old girl and was required to register as a sex offender. CP 229. Rogers went to the courthouse and looked up the documents. After learning the details, she proceeded to tell other people what she had learned. 6/10/15RP 119. She talked to Thornton about it on the phone. 6/10/15RP 120. She called other women to warn them about Sampson. 6/11/15a.m.RP 13. Rogers thought of Sampson as her enemy. 6/11/15a.m.RP 21. She tried to get the word out to everyone that Sampson was a bad guy. 6/11/15p.m.RP 84.

Rogers's and Thornton's children overheard their mothers talking about Sampson—that he was a sex offender and a child molester. Thornton lived with two of her children, L.H., who was around five years old, and L.R., who was around seven years old. 6/09/15RP 65-66, 75-76, 167-68; 6/15/15RP 20. L.H. and L.R. overheard their mother and Rogers talking about Sampson on the

telephone. 6/10/15RP 28; 6/15/15RP 68. L.H. overheard his mother and Sampson arguing about his being a sex offender. 6/10/15RP 27.

L.H. and L.R. had two cousins, Labrina and Patricia, who often spent the weekends at Thornton's house while Sampson was living there. 6/04/15RP 128-31, 135; 6/09/15RP 78. While visiting, Labrina¹ overheard people talking about Sampson. 6/04/15RP 146, 151.

Rogers lived with two of her children, P.W. and N.P.² 6/10/15RP 65, 85. P.W. overheard her mother and Sampson arguing about other women. 6/11/15p.m.RP 72. She overheard her mother and Thornton talking about how Sampson cheated on them and was a child molester. 6/11/15p.m.RP 81. P.W. overheard her mother tell family and friends that Sampson was a sex offender. 6/11/15p.m.RP 73-74. Rogers got the police report from Sampson's prior conviction and showed it to other people. 6/11/15p.m.RP 75. P.W. saw it and read it. 6/11/15p.m.RP 76.

Around June 2009, Patricia told her school principal that Sampson had sexually assaulted her. 6/04/15RP 49, 60, 65-66, 112. But she later changed her story. 6/04/15RP 115. The police

¹ Patricia did not testify.

² Despite Sampson's attempts to compel N.P.'s attendance at trial, he did not testify.

investigated the claim but soon concluded it was unreliable. 6/04/15RP 115. Patricia told her sister Labrina that Sampson had raped her but later admitted she was lying. 6/04/15RP 148. Patricia told L.R. that Sampson had done bad things to her. 6/10/15RP 31-32.

As part of her investigation into Patricia's allegations, Seattle Police Detective Donna Stangeland talked to Labrina. Labrina said she had overheard L.R. tell her mother she was molested by Sampson. 6/08/15RP 42. L.R. was interviewed by Carolyn Webster, a child interview specialist who worked for the prosecutor's office. 5/28/15RP 39. L.R. made no disclosures about Sampson. 5/28/15RP 42.

Detective Stangeland then talked to Thornton and said that, notwithstanding L.R.'s failure to report anything, Stangeland still believed L.R. might have been molested by Sampson. 6/08/15RP 39-40. At first, Thornton said she had asked both L.R. and L.H. if Sampson touched them and they both denied it. 6/08/15RP 42; 6/15/15RP 135. Thornton expressed concern that her children might be taken by CPS and Stangeland reassured her. 6/08/15RP 40. At that point, Thornton contradicted herself and said both L.R. and L.H. had alleged sexual abuse by Sampson. 6/08/15RP 44. She said she had

told them not to tell anyone because she was afraid they would be taken. 6/09/15RP 108-20.

L.R. was interviewed again. At her second interview, she said Mr. Sampson “touched me and my brother’s privacy.” Exhibit 15 at 10. L.H. was interviewed the same day. He said L.R. told their mother that Sampson “stick his thing in my butt.” Exhibit 16 at 16.

Sampson was charged and convicted of counts of sexual abuse involving L.R. and L.H., as well as Rogers’s son, N.P. CP 13-17, 19-30. At trial, the State introduced evidence of Sampson’s prior sexual assault under RCW 10.58.090, and used that evidence to argue Sampson had a propensity to commit sex offenses against children. State v. Sampson, 175 Wn. App. 1032, 2013 WL 3379606, at *1. Soon afterward, the Washington Supreme Court struck down RCW 10.58.090 as unconstitutional. See State v. Gresham, 173 Wn.2d 405, 269 P.3d 207 (2012). This Court then reversed Sampson’s convictions, holding the erroneous admission of propensity evidence was not harmless. Sampson, 2013 WL 3379606, at *1.

This Court concluded the error in admitting propensity evidence was not harmless because the untainted evidence “was by no means

overwhelming.” Id. at *6. In particular, the Court questioned the reliability of the child witnesses:

The reliability of the child witnesses was, of course, of central importance to the State’s case against Sampson. The children’s accounts of Sampson’s misconduct, however, shifted over the course of the investigation. For instance, although L.R. denied to Webster that she had observed Sampson watching pornography, by the time of trial, L.R. was able to fully corroborate her cousin’s allegation that Sampson had shown her a “nasty” movie. Similarly, in his interview with Webster, L.H. stated that Sampson had “sucked his own wee-wee” and “drunk [his] sister’s pee.” At trial, however, L.H. denied that Sampson had ever done anything with his mouth to L.H.’s “front private.” Nor did L.H. repeat his claim that Sampson had drunk his sister’s urine. Furthermore, unlike the child witness in *Gresham*, the children in this case offered few details of Sampson’s sexual misconduct. Indeed, at trial, L.H. was unable to articulate any details of Sampson’s actions.

Id.

Also, the Court noted, the child witnesses “had significant contact with one another throughout the investigation and criminal proceedings,” suggesting their statements were tainted. Id. at *6 n.10.

The Court explained,

L.H. and L.R. were cousins of [Patricia], the teenage girl who initially alleged sexual abuse by Sampson. L.R. admitted to Webster that [Patricia] had told L.R. about her allegations against Sampson. For his part, L.H. appears to have taken many cues from his sister. In his initial report to Thornton, L.H. merely repeated L.R.’s description of Sampson’s conduct toward him. Indeed,

Webster prompted L.H. to discuss Sampson's conduct by asking L.H. what L.R. had told their mother about Sampson.

Id. at *6 n.10.

After Sampson's convictions were reversed, Rogers told her daughter P.W. she should testify again at Sampson's new trial.³ She said it was important to testify to make sure Sampson never got out of prison. 6/11/15a.m.RP 29; 6/11/15p.m.RP 56.

P.W. had always insisted Sampson never molested her. She told the police that Sampson did not touch her. 6/11/15p.m.RP 13, 37-38. Her mother asked her more than once if Sampson ever touched her and each time she said no. 6/11/15p.m.RP 13. She testified under oath at the first trial and did not say that Sampson had touched her. 6/11/15p.m.RP 54-55.

But now that the convictions were reversed and a new trial was pending, P.W. changed her story and said Sampson *did* touch her one time. She first made this allegation during a telephone interview with the attorneys in February 2015. 6/11/15p.m.RP 39, 45. At trial, she

³ At the first trial, P.W. had testified about the videotape Sampson allegedly took of her and about disclosures her brother N.P. had made to her. 5/26/15RP 48.

said Sampson gave her vodka one night and, when she was drunk, he touched her vaginal area before she passed out. 6/11/15RP 17-25.

The State charged Sampson with three counts of first degree child molestation, one each involving L.R., L.H. and P.W.⁴ CP 40-41.

Before trial, Sampson moved to admit the testimony of his expert on child interview techniques and memory, Dr. Yuille. Dr. Yuille had analyzed the children's forensic interview statements and identified three characteristics that were relevant to determining whether the allegations were the product of actual memories, as opposed to descriptions of events the children imagined or heard about. CP 135-41. Dr. Yuille said these features made it impossible to conclude the statements were the product of actual memories. Id.

The State objected and the trial court denied the motion to admit Dr. Yuille's testimony. CP 202-28; 5/28/15RP 143-44. The court reasoned Dr. Yuille's opinion dealt with matters within the jurors' common experience and invaded the province of the jury to decide credibility. 5/28/15RP 143-44.

Also, before trial, Sampson moved to compel the attendance of N.P., who was an original charged complainant and had testified at the

first trial. CP 43-67. The court denied the motion, finding Sampson had not shown what N.P.'s testimony would be. CP 77.

During trial, Sampson also moved to compel the testimony of the victim advocate, who had sent an exculpatory email to the prosecutor prior to the first trial, which claimed that one of the witnesses had admitted her allegations were false. Exhibit 46; 6/15/15RP 133-34. The court denied the motion. 6/04/15RP 88, 90.

At trial, audiovisual recordings of L.H.'s and L.R.'s forensic interviews were played. 6/08/15RP 117-20; Exhibit 9, 10, 11. Also, L.H., L.R. and P.W. testified. 6/09/15RP 167-92; 6/10/15RP 19-61; 6/11/15a.m.RP 84-115; 6/11/15p.m.RP 13-84; 6/15/15RP 20-107.

Sampson testified he did not have sexual contact with any of the children. 6/17/15RP 421-22, 429, 512. He did not take a video of P.W. while she was getting ready to take a shower. 6/17/15RP 470. Sampson also denied the allegations in several telephone calls he made to Rogers while in jail. 6/11/15a.m.RP 38-40.

During deliberations, the jury asked to replay the audiovisual recordings of the three forensic interviews of L.H. and L.R. 6/19/15RP

⁴ The State dropped the charge involving N.P. Sampson was also charged with two counts of communication with a minor for immoral purposes but the jury acquitted him of those charges. CP 40-41, 258-62.

3; CP 265. Defense counsel objected but the court permitted the jury to replay the recordings in their entirety. 6/19/15RP 3-4, 8, 12-13.

The jury found Mr. Sampson guilty as charged of three counts of first degree child molestation. CP 258-62. The court imposed a sentence of life in prison without the possibility of release. CP 270.

D. ARGUMENT

1. The trial court violated ER 702 and Sampson's constitutional right to present a defense by prohibiting him from calling an expert witness to explain why features of the children's statements made it unlikely they were the product of actual memories.

a. Dr. Yuille's testimony was admissible under ER 702 because it was relevant to the central issue of the reliability of the children's statements, and because it addressed matters not within the common understanding of ordinary people.

The central issue in this case was the reliability of the children's statements, that is, whether they were the product of actual memories.

The State presented no other evidence of sexual contact. Yet the children's statements were inconsistent, contradictory and lacked detail.

Also, the witnesses communicated with each other and with their mothers about their statements and about Sampson's prior sex offense, suggesting the possibility of taint.

Recognizing these weaknesses in the State's case, the defense proposed to call an expert witness, Dr. John Yuille, to explain why the children's allegations were probably not the product of genuine memories. Dr. Yuille is an expert in human memory and child interview techniques. CP 137. Defense counsel argued the testimony would be helpful to the jury and was admissible under ER 702. 5/28/15RP 132-37.

The trial court's decision to exclude the expert testimony under ER 702 is reviewed for abuse of discretion. State v. Green, 182 Wn. App. 133, 146, 328 P.3d 988, review denied, 337 P.3d 325 (2014).

Mr. Sampson submitted Dr. Yuille's report and expert qualifications to the court as an offer of proof. CP 131-41. The State conceded Dr. Yuille's qualifications as an expert. 5/28/15RP 122

Dr. Yuille's report discussed what must be considered when interviewing children, noting that children "are particularly susceptible to the effects of leading questions and suggestions." CP 132. "In addition, the interviewer must have knowledge of the memory, language and expressive abilities of children of different ages." Id.

Dr. Yuille's report also described a method he and other researchers developed for evaluating the reliability or accuracy of a

child's statements. CP 134-37. Dr. Yuille noted that the term "credibility" in this context "is not synonymous with truth telling." CP 134. Rather, the procedures "are intended to determine, with varying degrees of certainty, if the child's disclosure has the features of a real memory, that is, a memory of a personally experienced event." CP 136. Furthermore, "it is possible that some parts of an allegation are assessed as credible and other parts are not. For example, a child who has been abused may exaggerate the extent of the abuse." CP 136.

Dr. Yuille reviewed the transcripts and audiovisual recordings of the interviews of L.H. and L.R. and a transcript of an interview with P.W. CP 131-32. Dr. Yuille determined the allegations were characterized by three features: (1) they changed with the passage of time; (2) they were "characterized by incoherent or unlikely features"; and (3) "[t]here is a suggestion that witness evidence has been affected by communication between the witnesses." CP 138. Dr. Yuille concluded these features made it unlikely the statements were the product of actual memories. CP 140-41.

Because Dr. Yuille was an expert on memory who could explain how and why these characteristics were relevant in deciding whether the children's statements reflected their actual memories, Dr. Yuille's

testimony was relevant and helpful to the jury. It did not invade the jury's province to decide the ultimate issue of the children's credibility.

These three troubling characteristics identified by Dr. Yuille are apparent not only from the children's out-of-court statements but also from their in-court statements. First, the children's allegations were internally inconsistent and contradicted by other evidence. For example, in his interview, L.H. said Sampson "stuck his thing in his butt when he was sleeping in his bedroom," but then he said "he was not in his bedroom but on the couch watching TV. He said that he was sitting on the couch. When asked how Marcel could put his thing in his butt while he was sitting he changed his allegation to say that he was lying down." CP 138; Exhibit 16 at 22.

L.H. also alleged he saw Sampson drink L.R.'s pee, but L.R. denied Sampson ever drank her pee. Exhibit 16 at 17; 6/15/15RP 90. L.H. continued to maintain at trial that he saw Sampson drink L.R.'s pee while she was on the toilet. 6/10/15RP 52, 57 L.H. also stated he saw his mother and Sampson having sex but later at trial, he denied it. Exhibit 16 at 29; 6/10/15RP 45. He said in his interview Sampson "sucked his own wee wee" but again he later denied it. Exhibit 16 at 32; 6/10/15RP 51. At trial, L.H. first testified he saw Sampson

touching his sister on her butt with his hand, while L.H. was peering through a crack in the door, but then he said he did not see Sampson do anything with his sister other than drink her pee. 6/09/15RP 187-90; 6/10/15RP 60-61.

L.R. stated she told her mother when Sampson touched her and her mother “put him out . . . [a]nd then she called the police.” Exhibit 15 at 9. She said her mother came in the door and “he got busted.” Exhibit 15 at 17. L.H. maintained at trial that he yelled for his mother when Sampson was touching him and told her Sampson “needs to get out of the house . . . [b]ecause he touched me.” 6/09/15RP 183. But Thornton testified the children did not make any disclosures until after Sampson had moved out. 6/09/15RP 132. She did not walk in while Sampson was touching them. 6/09/15RP 157. Also, L.H. stated Sampson never touched her insides her clothing, but at trial she said Sampson touched her private parts both inside and outside of her clothing. Exhibit 15 at 25; 6/15/15RP 42.

The jury could have benefited from Dr. Yuille’s testimony in making sense of these inconsistencies.

As to the second characteristic, most of the allegations were not provided in detail. CP 139. For example, L.R. said she saw Sampson

put his thing in L.H.'s butt but when asked to describe what she saw she said she forgot. CP 139; Exhibit 15 at 17. She also said Sampson touched her "privacy" but when asked for details she said she forgot. CP 139; Exhibit 15 at 19.

Dr. Yuille's testimony could have helped the jury understand that "[c]hildren may forget peripheral details related to an event but these examples are all related to central details." CP 139.

Other examples of incoherent allegations include L.H.'s statement that he saw Sampson "suck on his [own] wee-wee" and his allegation that he saw Sampson drink L.R.'s pee. CP 139; Exhibit 16 at 17, 32. Also, L.R. said when she saw Sampson touching L.H., she "rescued him like a superhero" and "actually picked him up and, like me and him called mommy and then he got in jail." Exhibit 15 at 17. She said when Sampson touched her while she was watching TV, she "kicked him" and "he passed out for a minute." Exhibit 15 at 17-18.

Dr. Yuille could have explained to the jury "[t]he combination of lack of central details and unlikely or incoherent details is often associated with invented, coached or false allegations." CP 140.

As for the third characteristic, the record plainly shows there was communication between the witnesses about the allegations as well

as between the witnesses and adults. CP 140. For example, P.W. said Sampson took a video of her in the shower but acknowledged she had not seen the video and had only heard about it from her mother. CP 140; 6/11/15p.m.RP 8. P.W. also said her mother tried to get the word out to everyone that Sampson was a bad guy. 6/11/15p.m.RP 84. P.W. saw the police report of Sampson's prior offense, which her mother was showing to everyone. 6/11/15p.m.RP 75-76. L.R. and L.H. overheard their mother and Rogers talking about Sampson on the telephone, and L.H. overheard his mother and Sampson arguing about his being a sex offender. 6/10/15RP 27. Patricia told L.R. that Sampson touched her. 6/10/15RP 31-32; Exhibit 15 at 31. L.H. said his father told him Sampson was a "sex fielder" and he would kill him. Exhibit 16 at 13. L.H. also described what L.R. had told their mother about Sampson. Exhibit 16 at 16.

Dr. Yuille concluded these three problematic characteristics of the children's allegations made it impossible to be certain they were the product of the children's real memories. Dr. Yuille explained:

When allegations vary in core details over time it is impossible to determine which versions, if any, should be treated as the 'correct' allegation. The presence of unlikely elements adds to the problem of confirming credibility: the unlikely features diminish the credibility of other aspects of the allegations. The communication

between witnesses raises the possibility of contamination of witness' memory.

CP 140-41.

Yet Dr. Yuille was not permitted to explain any of this to the jury because the trial court excluded his testimony altogether. The trial court reasoned Dr. Yuille's opinion was not helpful to the jury because it addressed matters within an ordinary person's understanding.

5/28/15RP 143-44. The court misapplied ER 702.

ER 702 provides:

If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.

Expert testimony is admissible under the rule if it will be "helpful to the jury in understanding matters outside the competence of ordinary lay persons." Green, 182 Wn. App. at 146.

The trial court erred under ER 702 in concluding Dr. Yuille's expert testimony on memory fell within the understanding of the average juror and would invade the province of the jury. Numerous studies show that certain subjects like memory and perception, which were previously thought to be commonly understood, "are actually not

as straightforward as thought.” State v. Cheatam, 150 Wn.2d 626, 646, 81 P.3d 830 (2003). Researchers have found that “while certain tendencies of memory may be matters of ordinary sensibility, human memory is far more fallible, and indeed malleable, than most recognize.” Justin S. Teff, Human Memory is Far More Fallible and Malleable than Most Recognize, 76-Jun N.Y. St. B.J. 38 (June 2004).

Thus, while decades ago courts generally excluded expert testimony regarding the ability of eyewitnesses to perceive and remember events accurately, “at this point the significant majority of federal and state courts addressing the question have held that such evidence is admissible.” Cheatam, 150 Wn.2d at 645. “Today, there is no question that many aspects of perception and memory are not within the common experience of most jurors, and in fact, many factors that affect memory are counter-intuitive.” United States v. Smithers, 212 F.3d 306, 316 (6th Cir. 2000).

Our supreme court in State v. Allen recently emphasized the importance of expert testimony in cases where the accuracy of perception and memory is at issue. State v. Allen, 176 Wn.2d 611, 294 P.3d 679 (2013). In that case, the issue was whether and when trial courts must instruct juries on the difficulties of accurately perceiving

and remembering faces of those who are of a different race than the observer. Id. at 613. The court held it was not error to refuse to instruct the jury in that case. Id. But the four-justice lead opinion noted it *would have* been appropriate for the defendant to present expert testimony on the issue. Id. at 624 n.6. Justices Chambers and Fairhurst wrote a special concurrence to underscore this point: “The recognition that expert testimony is admissible is very important to our justice system” Id. at 634 (Chambers, J., concurring).

The two dissenting justices explained why the issue is not one of credibility that invades the province of the jury, and not one that can be addressed through cross-examination. As Dr. Yuille stated in his report, CP 134-36, the issue is not whether the witness is lying; the problem is that the witness may genuinely believe the “facts” in his or her memory, but that memory may be inaccurate. Allen, 176 Wn.2d at 640 (Wiggins, J., dissenting). Chief Justice Madsen agreed that “the very nature of the problem is that witnesses believe their [testimony] is accurate.” Id. at 633 (Madsen, J., concurring). Because the issue is one of reliability rather than credibility, all nine justices in Allen rejected the State’s argument that a jury instruction on the fallibility of memory

with respect to eyewitness identifications would constitute an unconstitutional comment on the evidence. Id. at 624 n.7.

Other courts have recognized the same principles. For example, the Texas Court of Criminal Appeals recently stated: “[A] vast body of scientific research about human memory has emerged. That body of work casts doubt on some commonly held views relating to memory.” Tillman v. State, 354 S.W.3d 425, 441 (Tex. Crim. App. 2011) (quoted in State v. Lawson, 352 Or. 724, 760 n.10, 291 P.3d 673 (2012)). The Oregon Supreme Court similarly acknowledged the research mirroring that of Mr. Sampson’s proffered expert, including “the alterations to memory that suggestiveness can cause,” and “the difficulty of attempting to distinguish between the original memory and the new memory corrupted by later suggestiveness.” Lawson, 352 Or. at 749. “Witness memory can become contaminated by external information or assumptions embedded in questions or otherwise communicated to the witness.” Id. at 743. Further, “[s]cientists generally agree that memory never improves.” Id. at 779.

In response to the voluminous research demonstrating the unreliability of eyewitness memories, the Oregon Supreme Court

drastically changed its standards for the admissibility of eyewitness identifications, and also discussed the importance of expert testimony:

As a result of the substantial degree of acceptance within the scientific community concerning data on the reliability of eyewitness identifications, federal and state courts around the country have recognized that traditional methods of informing factfinders of the pitfalls of eyewitness identification—cross-examination, closing argument, and generalized jury instructions—frequently are not adequate to inform factfinders of the factors affecting the reliability of such identifications. See State v. Guilbert, 306 Conn. 218, 49 A.3d 705 (2012) (finding that scientific research on the reliability of eyewitness identifications enjoys strong consensus in the scientific community, that many factors affecting eyewitness identifications are unknown to average jurors or are contrary to common assumptions, and that cross-examination, closing argument, and generalized jury instructions are not effective in helping jurors spot mistaken identifications).

Lawson, 352 Or. at 759-60. The court listed numerous other state and federal cases affirming the validity of the scientific research on perception and memory and the admissibility of expert testimony based on that research. Id. at 760 n.10.

The offer of proof Sampson presented at trial is consistent with the above authority. Dr. Yuille’s scientific explanations would have been helpful to the jury on the critical issue in the case—the reliability of the children’s statements—and should have been admitted under ER 702. The trial court erred in concluding to the contrary.

- b. *Exclusion of Dr. Yuille’s testimony violated Sampson’s constitutional right to present a defense because it was relevant to his defense and not so prejudicial as to disrupt the fact-finding process at trial.*

Not only was the trial court’s ruling incorrect under the Evidence Rules, it also violated Sampson’s constitutional right to present a defense. This Court reviews *de novo* whether a defendant’s constitutional right to present a defense was violated. State v. Jones, 168 Wn.2d 713, 719, 230 P.3d 576 (2010).

“Few rights are more fundamental than that of an accused to present witnesses in his own defense.” State v. Franklin, 180 Wn.2d 371, 378, 325 P.3d 159 (2014) (quoting Chambers v. Mississippi, 410 U.S. 284, 302, 93 S. Ct. 1038, 35 L. Ed. 2d 297 (1973)). This right is guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and article I, section 22 of the Washington Constitution. U.S. Const. amends. VI, XIV; Const. art. I, § 22; State v. Jones, 168 Wn.2d 713, 720, 230 P.3d 576 (2010); Cheatam, 150 Wn.2d at 648 (citing Rock v. Arkansas, 483 U.S. 44, 52, 107 S. Ct. 2704, 97 L. Ed. 2d 37 (1987)).

This constitutional right may not be abrogated by statute or court rule. See Jones, 168 Wn.2d at 719-24. In Jones, the defendant

was accused of rape, and his defense was that the complainant consented to intercourse during a drug-fueled sex party, where she also had sex with two other men. Id. at 717. The trial court found the evidence was offered to attack the complaining witness's credibility, and was barred by the rape shield statute. Id. at 717-18. The supreme court reversed. Jones, 168 Wn.2d at 725. It held the statute did not bar the evidence, but that even if it did, Jones's constitutional right to present a defense would trump the statute. Id. at 719-24.

The court emphasized “[t]he 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.” Id. at 720 (quoting Chambers, 410 U.S. at 294). Thus, so long as a defendant’s proffered evidence is minimally relevant, the trial court may not exclude it unless the State proves “the evidence is so prejudicial as to disrupt the fairness of the fact-finding process at trial.” Jones, 168 Wn.2d at 720. For evidence of high probative value, “no state interest can be compelling enough to preclude its introduction consistent with the Sixth Amendment and Const. art. I, § 22.” Id. Following these rules, the court held that because the proffered evidence regarding a consensual all-night sex

party was “Jones’s entire defense,” the trial court violated his constitutional rights by excluding such evidence. Id. at 721.

The same is true here. The inaccuracy of the children’s memories was the entire defense, yet Sampson was not permitted to introduce his proffered evidence supporting that defense. The trial court’s ruling violated Mr. Sampson’s constitutional right to a fair trial.

c. The convictions must be reversed.

Evidentiary errors require reversal if, “within reasonable probabilities, the outcome of the trial would have been materially affected had the error not occurred.” State v. Thomas, 35 Wn. App. 598, 609, 668 P.2d 1294 (1983). But because the exclusion of Sampson’s expert also violated his constitutional right to present a defense, the constitutional harmless error standard applies. Jones, 168 Wn.2d at 724. That is, a new trial is required unless the State proves beyond a reasonable doubt the error was harmless. Id.; Chapman v. California, 386 U.S. 18, 24, 87 S. Ct. 824, 17 L. Ed. 2d 705 (1967). Reversal is required here under either standard.

The only question in the case was whether the children accurately remembered and related what happened. Their stories throughout the years kept changing. Their statements were vague and

full of unlikely details. The children were influenced by each other and by their mothers. Sampson was not permitted to present expert testimony supporting his defense that the contradictory stories showed the children's statements were inaccurate and likely contaminated by post-event influences. Sampson's attorney was left to argue the complainants' memories were unreliable without being able to support that argument with expert testimony explaining *why* the jury should question the accuracy of the children's statements. Had the trial court properly permitted expert testimony, the outcome may well have been different. This Court should reverse and remand for a fair trial.

2. The trial court abused its discretion in admitting hearsay that did not fall under any exception to the hearsay rule.

a. The trial court admitted "child hearsay" that far exceeded its authority under the child hearsay statute.

RCW 9A.44.120 has procedural and substantive limitations on the admissibility of a child's out-of-court statements at a criminal trial. Substantively, this hearsay exception applies only to a child's statements "describing *any act of sexual contact performed with or on*

the child by another, [or] describing any attempted act of sexual contact *with or on the child* by another.” (emphases added).⁵

Thus, the child’s out-of-court statement must (1) relate to sexual contact and (2) be a statement about an act performed on that child, not another child. RCW 9A.44.120 “does not apply by its terms to a statement by a child describing an act of sexual contact performed on a different child.” State v. Harris, 48 Wn. App. 279, 284, 738 P.2d 1059 (1987). In Harris, a detective repeated what one child said to another child. The Harris Court ruled this statement was “not within the scope of the child hearsay statute because it does not describe sexual contact performed on [the declarant].” Id.

A similar error occurred in State v. Hancock, 46 Wn. App. 672, 731 P.2d 1133 (1987), where one child testified about what the accused did to another child. The Hancock Court ruled the hearsay statement “does not fall within the purview of RCW 9A.44.120 and its admission was error.” Id. at 678; see also State v. Alvarez-Abrego, 154 Wn. App. 351, 365-66, 225 P.3d 396 (2010) (error to admit child’s out-of-court statement describing act of abuse performed on different child).

⁵ A third type of statement relating to allegations of physical abuse does not pertain this this case. RCW 9A.44.120.

Rather than limiting its use of child hearsay to one child's claim of "sexual contact" performed on or with that same child, the prosecution used RCW 9A.44.120 as a springboard for admitting evidence about wrongful acts that did not happen to that same child.

The trial court admitted multiple damaging hearsay statements that did not conform to the requirements of the child hearsay statute. In L.R.'s forensic interview, she made several statements regarding events she allegedly witnessed involving her brother, L.H. Exhibit 15 at 10, 12, 14. For instance, she said she saw Sampson "touch my brother." Exhibit 15 at 10. She said she saw Sampson "putting his thingy in him." Exhibit 15 at 12. Similarly, Thornton testified L.R. told her she saw Sampson "trying to stick [his penis] in [L.H.'s] rear." 6/09/15RP 117. Likewise, L.H. said he saw Sampson "[drink] my sister's pee." Exhibit 16 at 17.

Sampson objected to the State's improper use of child hearsay testimony. He argued in his brief and to the court that the children's hearsay statements should not be admitted because they were inconsistent, unreliable and tainted. CP 145-70; 5/28/15RP 120-21, 132-37; 6/01/15RP 23-26. He also moved pretrial to exclude all hearsay "unless admissible under law." CP 198. Counsel objected on

the basis of hearsay when the audiovisual recordings of the children's interviews were admitted at trial. 6/08/15RP 112, 114. The court admitted the hearsay without limitation after a hearing on the reliability of the statements. 5/28/15RP143-44; 6/01/15RP 31-32; 6/08/15RP 112, 114. The court's ruling was erroneous because the statements did not comply with the child hearsay statute.

Improperly admitted evidence that impacts a jury's deliberations causes reversible error. Gresham, 173 Wn.2d at 433. The child hearsay testimony bolstered the in-trial testimony of the children and was decidedly prejudicial because, as discussed in the preceding section, the child witnesses did not articulate the same allegations as they had out of court. The prosecutor had to ask L.H. leading questions and tell him the answers or simply move forward without any answer. 6/09/15RP 179-93. The prosecutor also had to ask L.R. leading questions, resulting in vague allegations that Sampson "touched me" on "[m]y vagina" "[a] few times" "on my bed." 6/15/15RP 37-38, 41-43. When asked for further details, L.R. simply replied, "[h]e was touching on my vagina." 6/15/15RP 42. During deliberations, the jury asked to replay the audiovisual recordings of the interviews, in which the children told Webster what had happened to the other child. 6/19/15RP

3-8. Repeating the child hearsay in a manner unauthorized by the child hearsay statute impermissibly bolstered the State's tenuous case and impacted the jury's deliberations.

b. The trial court erroneously admitted a damaging hearsay statement offered to prove consciousness of guilt.

The trial court abused its discretion in admitting an out-of-court statement offered to prove the truth of the matter asserted. During trial, Detective Stangeland testified Thornton called her one day soon after Stangeland had questioned her in regard to her investigation of Patricia's allegations. 6/04/15RP 95. The prosecutor asked Stangeland if Thornton said why she was calling, and defense counsel objected on the basis of hearsay. 6/04/15RP 95-96. The prosecutor said the statement was not being offered for the truth of the matter asserted and the trial court overruled the objection. 6/04/15RP 96. Detective Stangeland then testified that Thornton told her that Sampson's mother had come to her house and pounded on the door. Thornton said "[s]he was afraid she was being retaliated against in some way because of her contact with regard to this case." 6/04/15RP 96. This statement made by Thornton was inadmissible because it was plainly hearsay.

“‘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(d). “Hearsay is not admissible except as provided by these rules, by other court rules, or by statute.” ER 802.

Thornton’s damaging out-of-court statement offered through Stangeland’s testimony was inadmissible hearsay. Contrary to the prosecutor’s assertion, it was offered to prove the truth of the matter asserted. The statement was offered to prove that Sampson’s mother went to Thornton’s house and pounded on her door, and that Thornton was afraid she was being retaliated against.

The erroneous admission of the evidence was harmful and prejudicial because it was offered to show consciousness of guilt. Pretrial, the State had offered the evidence to show Sampson’s consciousness of guilt, and the court admitted it for that purpose. 5/27/15RP 14, 19. The prosecutor had asserted the evidence would come in through the testimony of Thornton herself and not as hearsay. 5/27/15RP 14. But the prosecutor never asked Thornton about it on the stand. See 6/09/15RP 61-122, 159-63. Instead, the evidence was admitted at trial in the form of hearsay, as an out-of-court statement

made by Thornton to Stangeland, offered to prove the truth of the matter asserted. Regardless of whether the evidence was relevant, it was inadmissible because it was hearsay. ER 802. The trial court's ruling to the contrary was erroneous and prejudicial.

3. The trial court violated Sampson's Sixth Amendment right to compel the attendance of two material witnesses in his defense.

Few rights are as fundamental as that of an accused to present witnesses in his own defense. The right to compel witnesses is guaranteed by the Sixth Amendment. State v. Smith, 101 Wn.2d 36, 41, 677 P.2d 100 (1984). In Smith, our supreme court explained:

“The right to offer the testimony of witnesses, and to compel their attendance, if necessary, is in plain terms the right to present a defense, the right to present the defendant's version of the facts as well as the prosecution's to the jury so it may decide where the truth lies. Just as an accused has the right to confront the prosecution's witnesses for the purpose of challenging their testimony, he has the right to present his own witnesses to establish a defense. This right is a fundamental element of due process of law.”

Smith, 101 Wn.2d at 41 (quoting Washington v. Texas, 388 U.S. 14, 19, 87 S. Ct. 1920, 18 L. Ed. 2d 1019 (1967)).

The right to compel witnesses is limited to witnesses that are material. Smith, 101 Wn.2d at 41-42. The defendant must show he has “a colorable need for the person to be summoned.” Id.

a. *The trial court erred in refusing to compel the attendance of N.P.*

The trial court erred in refusing to compel the attendance of N.P. because his testimony was material to the defense. Prior to trial, defense counsel moved to compel N.P.'s attendance. CP 43-67. N.P. is Rogers's son and was an original charged complainant who testified at the first trial. CP 46.

N.P.'s testimony was material to Sampson's defense that Rogers influenced her children to allege sexual abuse by Sampson in retaliation for Sampson's infidelity and domestic violence against her. In his offer of proof, counsel asserted N.P. would testify that Rogers questioned him about possible sexual abuse by Sampson, leading to two charges of rape of a child. CP 47. Rogers had questioned N.P. even after being told by the police not to. CP 47. N.P. initially denied being touched, and thus it is reasonable to infer his disclosure was influenced by Rogers's questioning. CP 46-47. At the first trial, N.P. said Sampson hurt him in the bathtub but he was unable to articulate how that occurred. CP 47. He first told the jury he had forgotten, then said he believed Sampson had used a "weapon" or his teeth to cause the pain. CP 47. As with the other child witnesses, N.P.'s account shifted over the course of the investigation and he offered few details of sexual

misconduct. CP 47. His testimony was material to support the defense that Rogers had an improper motive to influence the children and that her questioning tainted their allegations. CP 48. Moreover, N.P.'s testimony was material for the additional reason that he was a participant in and witness to the underlying events. CP 48.

Because N.P.'s testimony was material to the defense and Sampson had a colorable need for his testimony, the trial court erred and violated Sampson's fundamental constitutional right to call witnesses in his defense by refusing to order N.P.'s attendance at trial.

b. The trial court erred in refusing to compel the testimony of the victim advocate.

The trial court also erred in refusing to compel the attendance of the victim advocate because her testimony was necessary to explain the circumstances of an exculpatory email message she had sent. In December 2010, before the first trial, the victim advocate sent an email to the prosecutor which stated:

We are scheduled to meet with Labrina on 1/7/11 at 12:30 p.m. Her mother, Tovonna, will be bringing her in. They received the subpoenas. She wanted to note that Labrina has since said that it didn't happen to her and that Patrica [sic] told her to say those things.

Exhibit 46; 6/15/15RP 133-34. Labrina and Patricia were cousins of L.H. and L.R. who often spent the night at Thornton's house while

Sampson was there. 6/04/15RP 128-31, 135; 6/09/15RP 78. The police investigation began when Patricia alleged sexual abuse by Sampson, but the police later concluded her allegations were not credible. 6/04/15RP 115. Patricia told Labrina and L.R. that Sampson had touched her. 6/10/15RP 31-32; Exhibit 15 at 31.

Plainly the email message sent by the victim advocate was material because it supported the theory that Patricia had talked to the other witnesses and influenced their statements, and it confirmed that the witnesses' statements changed over time for improper reasons.

The trial court recognized the relevance and admissibility of the email message but denied the motion to compel the testimony of the victim advocate, even though she was the author of the message. The court reasoned Sampson could present the information through other witnesses. 6/04/15RP 88, 90.

But none of the other witnesses could explain the circumstances of the email message. None of them could say *why* the victim advocate sent the message or what was the basis of her information. Detective Stangeland, who received a copy of the email message at the time it was sent, could not say anything illuminating about it because she had no personal knowledge of the conversation referred to in the message.

6/15/15RP 134. Labrina denied telling her mother she had made up the story about Sampson showing her a porn movie, or that Patricia had told her to lie about it. 6/04/15RP 84. Tovonna also denied that Labrina told her that what she had said about Sampson did not happen, or that she had lied about it, or that she had said those things to the victim advocate. 6/04/15RP 87. These denials, made several years after the message was sent, contradict the contents of the message.

Sampson should have been allowed to call the victim advocate so that he could ask her about the circumstances of the email message. The message was exculpatory and material to the defense that the allegations were manufactured. By refusing to compel the testimony of the victim advocate, the trial court violated Sampson's rights.

- 5. By allowing the jury to re-view the audiovisual recordings of the children's testimonial statements made during forensic interviews, the court placed undue emphasis on the testimony and violated Sampson's fundamental right to a fair and impartial jury.**

Strict rules places limitations on information that may be conveyed to the jury during deliberations because "at that point the jury is engaged in judging the facts." State v. Koontz, 145 Wn.2d 650, 653, 41 P.3d 475 (2002). The federal and state constitutions guarantee a defendant the right to a fair and impartial jury. Id.; U.S. Const.

amends. VI, XIV; Const. art. I, § 22. In light of the principle that a jury must remain impartial as it determines the facts, replaying testimony during deliberations is disfavored. Koontz, 145 Wn.2d at 654.

The rereading or rehearing of a witness's testimony during deliberations is error if it unduly emphasizes that testimony. United States v. Binder, 769 F.2d 595, 600 (9th Cir. 1985). "It is seldom proper to replay the entire testimony of a witness," as doing so would place undue emphasis on the testimony. Koontz, 145 Wn.2d at 647.

Allowing the jury to replay videotaped testimony raises greater concerns than simply reading from a transcript. Koontz, 145 Wn.2d at 654-57. "Videotape testimony is unique. It enables the jury to observe the demeanor and to hear the testimony of the witness." Binder, 769 F.2d at 600-01. These qualities of videotape testimony render it "the functional equivalent of a live witness." Id. Allowing the jury to replay videotape testimony during deliberations is therefore "equivalent to allowing a live witness to testify a second time." Id. at 601 n.1; see also Koontz, 145 Wn.2d at 656-57 (replaying videotapes of witnesses' testimonies effectively allows the State to recall the witnesses and have them testify a second time).

Allowing the jury to replay videotaped testimony is particularly prejudicial if the State's case turns on the credibility of the witness. In Binder, for example, the Ninth Circuit concluded that allowing the jury to re-view the videotaped testimony of the child complainants was reversible error because the only evidence of acts of sexual abuse was presented through the children's testimony. Binder, 769 F.2d at 600-01. Allowing the jury to see and hear the children's testimony a second time essentially allowed repetition of the government's case against Binder and placed undue emphasis on the testimony. Id.

Similarly, in Koontz, the Washington Supreme Court held that allowing the jury to review during deliberations the videotape recordings of three witnesses who had testified at trial was reversible error because it unduly emphasized the testimony and likely affected the verdict. Koontz, 145 Wn.2d at 651, 659-60.

Similar to those cases, here, allowing the jury to replay the audiovisual recordings of L.H.'s and L.R.'s testimony during deliberations placed undue emphasis on that testimony and likely affected the verdict. Although the recordings were made during forensic interviews that were conducted out of court, the children's statements elicited in the interviews are nonetheless deemed to be

“testimony.” See State v. Beadle, 173 Wn.2d 97, 110-11, 261 P.3d 863 (2011) (child victim’s statements made during forensic interview were “testimonial”). The statements were admitted as substantive evidence and relied upon by the State to prove the allegations. Exhibit 9, 10, 11.

Allowing the jury to replay the recordings during deliberations placed undue emphasis on the testimonies. The jury had a second opportunity to observe the demeanor and hear the voices of the child witnesses which was equivalent to allowing the State to present the testimonies of the witnesses for a second time. Binder, 769 F.2d at 600-01. No limits were placed on the replaying of the testimonies, as the interviews were replayed in their entirety. The credibility of the witnesses was the central issue in the case, as the only evidence of acts of sexual abuse was presented through the children’s testimonies. See Binder, 769 F.2d at 600-01. Under these circumstances, allowing the jury to view the audiovisual recordings for a second time during deliberations violated Sampson’s constitutional right to a fair and impartial jury and requires reversal. Koontz, 145 Wn.2d at 659-60.

6. The cumulative effect of multiple harmful trial errors denied Sampson a fair trial.

As discussed, several prejudicial errors occurred during Sampson’s trial. He was not permitted to present expert testimony that

would have supported his defense that the statements of the child complainants—the key evidence offered against him—was not reliable. He was not permitted to present the testimony of two witnesses in his defense. Damaging hearsay statements were erroneously admitted against him. And the jury was allowed to re-view the testimonies of two of the complaining witnesses during deliberations. Together these harmful errors cumulatively denied Sampson a fair trial.

Under the cumulative error doctrine, reversal is required when there have been several trial errors that standing alone may not be sufficient to justify reversal but when combined have denied a defendant a fair trial. *See, e.g., State v. Coe*, 101 Wn.2d 772, 789, 684 P.2d 668 (1984); *State v. Badda*, 63 Wn.2d 176, 183, 385 P.2d 859 (1963) (three instructional errors and the prosecutor’s remarks during voir dire required reversal); *State v. Alexander*, 64 Wn. App. 147, 158, 822 P.2d 1250 (1992) (reversal required because (1) a witness impermissibly suggested the victim's story was consistent and truthful, (2) the prosecutor impermissibly elicited the defendant’s identity from the victim’s mother, and (3) the prosecutor repeatedly attempted to introduce inadmissible testimony during the trial and in closing); *State v. Whalon*, 1 Wn. App. 785, 804, 464 P.2d 730 (1970) (reversing

conviction because of (1) court's severe rebuke of defendant's attorney in presence of jury, (2) court's refusal of the testimony of the defendant's wife, and (3) jury listening to tape recording of lineup in the absence of court and counsel); Taylor v. Kentucky, 436 U.S. 478, 487-88, 487 n.15, 490, 98 S. Ct. 1930, 56 L. Ed. 2d 468 (1978) (several errors may have cumulative effect of violating due process guarantee of fundamental fairness); United States v. Wallace, 848 F.2d 1464, 1475 (9th Cir. 1988) ("Although each of the above errors, looked at separately, may not rise to the level of reversible error, their cumulative effect may nevertheless be so prejudicial to the appellants that reversal is warranted."); U.S. Const. amend. XIV; Const. art. I, § 3.

Because several trial errors cumulatively denied Sampson a fair trial, his convictions must be reversed and remanded for a fair trial.

7. The arbitrary labeling of a persistent offender finding as a "sentencing factor" that need not be proved to a jury beyond a reasonable doubt violates the Equal Protection Clause of the Fourteenth Amendment.

a. Because a fundamental liberty interest is at stake, strict scrutiny applies to the classification at issue.

The Equal Protection Clause of the Fourteenth Amendment requires that similarly situated individuals be treated alike with respect

to the law. Plyler v. Doe, 457 U.S. 202, 216, 102 S. Ct. 2382, 72 L. Ed. 2d 786 (1982); U.S. Const. amend. XIV. When analyzing an equal protection claim, the Court applies strict scrutiny to laws implicating fundamental liberty interests. Skinner v. Oklahoma, 316 US. 535, 541, 62 S. Ct. 1110, 86 L. Ed. 1655 (1942). Strict scrutiny means the classification at issue must be necessary to serve a compelling government interest. Plyler, 457 U.S. at 217.

The liberty interest at issue here—physical liberty—is the prototypical fundamental right. “[T]he most elemental of liberty interests [is] in being free from physical detention by one’s own government.” Hamdi v. Rumsfeld, 542 U.S. 507, 529, 124 S. Ct. 2633, 159 L. Ed. 2d 578 (2004). Thus, strict scrutiny applies to the classification at issue. Skinner, 316 U.S. at 541.

b. Under either strict scrutiny or rational basis review, the classification at issue here violates the Equal Protection Clause.

Notwithstanding the above rules, Washington courts have applied rational basis scrutiny to equal protection claims in the sentencing context. State v. Manussier, 129 Wn.2d 652, 672-73, 921 P.2d 473 (1996). Under this standard, a law violates equal protection if it is not rationally related to a legitimate government interest. City of

Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 440, 105 S. Ct. 3249, 87 L. Ed. 2d 313 (1985).

Although the proper standard of review is strict scrutiny, the result of the inquiry is the same regardless of the lens applied. Under either strict scrutiny or rational basis review, the classification at issue is neither necessary to serve a compelling government interest nor rationally related to a legitimate government interest.

The Legislature determined that the State has an interest in punishing repeat criminal offenders more severely than first-time offenders. For example, defendants who twice previously violated no-contact orders are subject to a significant increase in punishment for a third violation. RCW 26.50.110(5); State v. Oster, 147 Wn.2d 141, 146, 52 P.3d 26 (2002). And defendants who have twice previously been convicted of “most serious” (strike) offenses are subject to a significant increase in punishment (life without parole) for a third violation. RCW 9.94A.030(33); RCW 9.94A.570. But the prior offenses that cause the significant increase in punishment are treated differently simply by virtue of the arbitrary labels “elements” of a crime or “sentencing factors” which have been attached to them.

Where prior convictions that increase the maximum sentence available are termed “elements,” they must be proved to a jury beyond a reasonable doubt. For example, a prior conviction for a felony sex offense must be proved to the jury beyond a reasonable doubt in order to punish a current conviction for communicating with a minor for immoral purposes as a felony. State v. Roswell, 165 Wn.2d 186, 192, 196 P.3d 705 (2008). Similarly, two prior convictions for violation of a no-contact order must be proved to the jury beyond a reasonable doubt in order to punish a current conviction for violation of a no-contact order as a felony. Oster, 147 Wn.2d at 146. In neither example did the Legislature label the facts elements. Courts simply treat them as such.

But where, as here, prior convictions that increase the maximum sentence available are termed “sentencing factors,” they need only be proved to the jury by a preponderance of the evidence. See State v. Witherspoon, 180 Wn.2d 875, 892-93, 329 P.3d 888 (2014). Just as the Legislature never labeled the facts in Oster or Roswell “elements,” the Legislature never labeled the fact at issue here a “sentencing factor.” Instead it is an arbitrary judicial construct. This classification violates the Equal Protection Clause because the government interest in either case is *exactly the same*: to punish repeat offenders more severely.

If anything, there might be a rational basis for requiring proof of prior convictions to a jury beyond a reasonable doubt in the “three strikes” context but not in other contexts because the punishment in the “three strikes” context is the maximum possible (short of death). Thus, it might be reasonable for the Legislature to determine that the greatest procedural protections apply in that context but not in others. But it makes no sense to say greater procedural protections apply where the necessary facts only marginally increase punishment but need not apply where the necessary facts result in the most extreme increase possible.

As the Supreme Court explained, “merely using the label ‘sentencing enhancement’ to describe [one fact] surely does not provide a principled basis for treating [two facts] differently.” Appendi v. New Jersey, 530 U.S. 466, 477, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000). But Washington treats prior convictions used to enhance current sentences differently based only on such labels. See Roswell, 165 Wn.2d at 192. “The equal protection clause would indeed be a formula of empty words if such conspicuously artificial lines could be drawn.” Skinner, 316 U.S. at 542. The imposition of a sentence of life without the possibility of parole violated the Equal Protection Clause. Sampson should be resentenced within the standard range.

8. Any request that costs be imposed on Sampson for this appeal should be denied because the trial court determined he does not have the ability to pay legal financial obligations.

This Court has broad discretion to disallow an award of appellate costs if the State substantially prevails on appeal. RCW 10.73.160(1); State v. Nolan, 141 Wn.2d 620, 626, 8 P.3d 300 (2000); State v. Sinclair, 192 Wn. App. 380, 388, 367 P.3d 612 (2016); RCW 10.73.160(1). An offender's inability to pay is an important consideration to take into account in deciding whether to disallow costs. Sinclair, 192 Wn. App. at 389.

Samspon does not have a realistic ability to pay appellate costs. The trial court entered an order authorizing Samspon to seek review at public expense and appointing public counsel on appeal. As the Court noted in Sinclair, RAP 15.2(f) requires that a party who has been granted such an order of indigency is required to notify the trial court of any significant improvement in financial condition. Sinclair, 192 Wn. App. at 393. Otherwise, the indigent party is entitled to the benefits of the order of indigency throughout the review process. Id.; RAP 15.2(f).

There is no trial court record showing Sampson's financial condition has improved or is likely to improve. Sampson received a sentence of life in prison without the possibility of parole. CP 270. At

sentencing, defense counsel urged the court to waive costs because Sampson is indigent. 7/31/15RP 7. The court agreed and imposed only costs it deemed mandatory. 7/31/15RP 7; CP 268. As in Sinclair, “[t]here is no realistic possibility that he will be released from prison in a position to find gainful employment that will allow him to pay appellate costs.” Sinclair, 192 Wn. App. at 393. Because Sampson does not have the present or likely future ability to pay appellate costs, this Court should not impose them if the State substantially prevails.

E. CONCLUSION

The trial court erred in refusing to allow Sampson’s expert to testify, in refusing to compel the testimony of two material witnesses, in admitting multiple hearsay statements, and in allowing the jury to replay audiovisual recordings of the testimonies of two key witnesses during deliberations. Together these errors cumulatively denied Sampson a fair trial and require reversal. Also, Sampson’s three-strike sentence violates the Equal Protection Clause and he must be resentenced within the standard range.

Respectfully submitted this 31st day of May, 2016.

/s/ Maureen M. Cyr

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

| | | |
|----------------------|---|---------------|
| STATE OF WASHINGTON, |) | |
| |) | |
| Respondent, |) | |
| |) | NO. 73805-4-I |
| v. |) | |
| |) | |
| MARCEL SAMPSON, |) | |
| |) | |
| Appellant. |) | |

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 31ST DAY OF MAY, 2016, 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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