No. 44842-4-II

COURT OF APPEALS, DIVISION II

OF THE STATE OF WASHINGTON

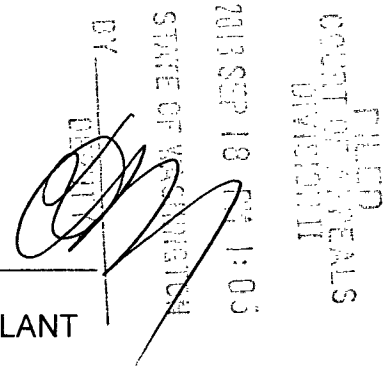
STATE OF WASHINGTON

Respondent

vs.

RYAN DEE WHITAKER

Appellant



CORRECTED OPENING BRIEF OF APPELLANT

APPEAL FROM THE SUPERIOR COURT OF CLARK COUNTY

HON. ROBERT LEWIS, JUDGE

Roger A. Bennett
Attorney for Appellant

112 W. 11th Street, Suite 200
Vancouver, WA 98660
(360) 713-3523
WSBA # 6536

Steven W. Thayer
Attorney for Appellant

112 W. 11th Street, Suite 200
Vancouver, WA 98660
(360) 694-8290
WSBA # 7449

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Attorney for Appellant

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(360) 694-8290
WSBA # 7449

I. INTRODUCTION

Ryan Dee Whitaker (Appellant) seeks reversal of his convictions at bench trial in Clark County Superior Court, cause number 11-1-01948-9, for the crimes of:

Count 3 – Child Molestation in the First Degree, RCW 9A.44.083

Count 4 – Child Molestation in the First Degree, RCW 9A.44.083.

Appellant also seeks vacation of a Sexual Assault Protection Order entered at sentencing.

Appellant will file a Personal Restraint Petition to supplement the record in this matter, and requests consolidation thereof with this appeal.

II. ASSIGNMENTS OF ERROR AND ISSUES

Assignments of Error

Assignment of Error Number 1: The Court erred in entering Finding of Fact number 1, for the reason that Appellant received ineffective assistance of counsel on Counts 3 and 4, Child Molestation in the First Degree, in violation of his constitutional right to counsel, because his trial attorney failed to interview and subpoena crucial potential defense witnesses.

Assignment of Error Number 2: The Court erred in entering Finding of Fact number 2, for the reason that Appellant received ineffective assistance of counsel on Count 3, Child Molestation in the First Degree, in violation of his constitutional right to counsel, because his trial attorney failed to interview and subpoena crucial potential defense witnesses.

Assignment of Error Number 3: The Court erred in entering Finding of Fact number 3, for the reason that Appellant received ineffective assistance of counsel on Count 4, Child Molestation in the First Degree, in violation of his constitutional right to counsel, because his trial attorney failed to interview and subpoena crucial potential defense witnesses.

Assignment of Error Number 4: The Court erred in admitting the testimony of Danielle Wilcox, an unlicensed counselor who testified concerning common characteristics of abused children, that she believed the victim, and that the victim had suffered sexual abuse at the hands of the Appellant.

Assignment of Error Number 5: The Appellant received ineffective assistance of counsel on Counts 3 and 4, Child Molestation in the First Degree, in violation of his constitutional right to counsel,

because his trial attorney failed to object to the testimony of Danielle Wilcox, an unlicensed counselor who testified concerning common characteristics of abused children, that she believed the victim, and that the victim had suffered sexual abuse at the hands of the Appellant.

Assignment of Error Number 6: The trial court erred, and abused its discretion in refusing to conduct a view of the scene of the alleged crimes.

Assignment of Error Number 7: The trial court erred in issuing a post-conviction Sexual Assault Protection Order without authority of law, because the expiration date on the order exceeded the time allowed by law for enforcement of such orders.

Issues Relating to Assignments of Error

Issue Number 1: Does a trial attorney provide ineffective assistance of counsel, by failing to interview crucial potential defense witnesses, and failing to subpoena such witnesses to testify in the defendant's behalf? (Assignments of Error 1, 2 and 3)

Issue Number 2: Is it a tactical maneuver by defense counsel to fail to interview and subpoena crucial potential defense witnesses, in a case resting entirely upon the testimony of a ten year old child, when such witnesses can directly contradict and rebut the child's

testimony? (Assignment of Error 1, 2 and 3)

Issue Number 3. In a trial for Child Molestation in the First Degree and Rape of a Child in the First Degree, is it error for the court to allow an unlicensed counselor to testify as an expert witness, without any showing of expertise, qualifications, nor basis of testimony other than statements by the alleged victim? (Assignment of Error Number 4)

Issue Number 4: In a trial for Child Molestation and Rape of a Child, may an unlicensed counselor testify as an expert concerning common characteristics of abused children, that she believes the child victim, that the child was molested, and that the child was molested by the defendant in the case? (Assignments of Error 4 and 5)

Issue Number 5: Does a trial attorney provide ineffective assistance of counsel, by failing to object to testimony as a purported expert by an unlicensed counselor concerning common characteristics of abused children, that she believes the child victim, that the child was molested, and that the child was molested by the defendant in the case? (Assignments of Error 4 and 5).

Issue Number 6: Does a trial judge abuse his discretion by refusing to undertake a view of the scene of the alleged crimes, in

a case where the both sides presented highly conflicting evidence as to what could be seen, by whom, and from what vantage points in the room of the alleged occurrence? (Assignment of Error 6.)

Issue Number 7: May a Superior Court judge issue a Sexual Assault Protection Order under RCW 7.90.150 for a period of one hundred years, when the statute does not authorize such an order? (Assignment of Error 7.)

III. STATEMENT OF THE CASE

On January 31, 2013, following a bench trial, Appellant Ryan Dee Whitaker was convicted of two counts of Child Molestation in the First Degree. These charges were contained in a Second Amended Information, filed during trial. CP 166.

Facts presented at trial:

In 2011, Defendant/Appellant Ryan Dee Whitaker was a member of the St. John's Ward of the Church of Latter Day Saints, located in Vancouver, Washington. RP 468, l. 21-24; p. 469, l. 1-14. Appellant was also a teacher for primary school students, and had a class of approximately 8 students. M*** S****, the eight year old alleged victim, was a member of the class. RP p. 475, l. 18-24, p. 476, l. 1.

Every Sunday, the students at the church would gather for

instruction in the "Sharing Time Room," which is large meeting room with rows of folding chairs. As many as 60 people would be present during these sessions, including a dozen or more adults, including parents and teachers. People were moving around in the room, engaged in various activities. RP p. 888 l. 6-23

Appellant, known as "Brother Whitaker" to the students, would sit with his class of eight and nine year olds in their assigned two rows of chairs, in the back of the room on the far right side, as viewed from the front of the room. RP p. 1103, l. 19-24.

Testimony of alleged victim.

M*** S**** testified at trial that during the period of January through August, 2011, Appellant would touch her in the Sharing Time Room on her vagina. Her testimony covers several pages, and relates that he would invariably reach behind her chair, come up from behind with his hand, go under her skirt, and touch her vagina. RP P. 482, l. 1-24; p. 483, l. 1-23. Her testimony does not express whether he reached down the waistband of her skirt, or whether he reached clear under her, and came back up through the opening of her skirt. She testified that this touching occurred every Sunday during the classes when other children were in the classroom. RP p. 483, l. 24; p. 484, l. 1- 10.

The touching allegedly continued for the entire 45 minutes of the classes. RP p. 534, l. 1-8, while the classmates sat near each other. RP p. 478, l. 23-24; p. 479, l.1-2.

M*** S**** testified that every time, Appellant's finger would go into the hole in her private parts. RP p. 487, l. 1-14. She subsequently changed her testimony and said that touching had occurred over her clothes, at a time when the class was singing Christmas songs. RP p. 40, l. 6-12. M*** was not in a class with Appellant during the Christmas season. He commenced teaching in January, 2011. RP p. 962, l. 7-8.

M*** also testified that Appellant had touched her one time outside of her clothes, in a different classroom, when just the two of them were present, RP p. 492-494. This alleged incident is apparently the basis for the charge in Count IV, child Molestation in the First Degree. M*** had told her mother, however, that the touching never occurred anywhere except in the Sharing Time Room. RP p. 615, l. 9-14.

For at least a month, in late July and in August, 2011, another teacher, "Brother Gonsalves," would sit with the class as well. RP p. 846, l. 4-24.

Hearsay Witnesses.

To bolster the uncorroborated testimony of M*** S****, the State sought to admit the testimony of the usual parade of RCW 9A.44.120 and other hearsay witnesses.

1. The State offered the testimony of Arica S**** and Jason S****, the child's parents, relating to the first disclosure made to them by M*** on August 30, 2011. RP p. 18- 23. In this rendition, M*** told Arica S**** that the touching had happened on her inner thighs. RP p. 18, l. 6-11, and "the front and the back." RP p. 23, l. 17-18.

2. The State sought to admit the testimony of a Bishop Mansius, who, on August 31, 2011, along with Arica S**** and Jason S****, discussed the allegations in front of M***, and then questioner her about them. RP p. 75, l. 13-19; p. 76, l. 5-12.

3. The State offered the testimony of Cynthia Bull, a detective with the "Children's Justice Center" as to statements made during her interview with M*** S****. RP p. 165-170.

4. The State offered the testimony of Dr. Kim Copeland, a physician who works with the "Children's Justice Center" as to statements made by M*** in her interview with the child. RP p.107-117.

5. Additionally, the State sought to admit the testimony of Danielle Wilcox, an unlicensed counselor, who was not eligible to be

licensed for lack of sufficient education, RP p. 721, l. 12-17. Ms. Wilcox provided "therapy" to M***, and was called to testify as to M***'s statements to her, under the hearsay exception for statements made for the purpose of medical diagnosis, ER 803(a)(4). RP p. 724-730.

After a lengthy pretrial hearing, the court issued rulings concerning the hearsay witnesses listed above. The Court did not enter written Findings of Fact and Conclusions of Law; however, the record indicates that the judge ruled as follows;

1. The statements to the parents on August 30, 2011 were admissible. RP p. 429 l. 23-25; 430 l. 1-8.

2. The statements on August 31, 2011 to the Bishop and the parents were unreliable and not admissible. RP p. 430, l. 24-25; p. 431, l. 1-15.

3. The statements to Cynthia Bull on October 4, 2011 were not in accordance with approved protocols for child interviews, but the circumstances indicated sufficient reliability to allow them into evidence. RP p. 432, l. 9-12.

4. The statements to Dr. Copeland were elicited in a manner which rendered them unreliable and not admissible under RCW 9A.44.120. RP p. 432, l. 17-25; p. 433, l. 1-14. Further, they were

not made for purposes of medical diagnosis, and not admissible under ER 803(a)(4). RP p. 453, l. 10-20.

5. The statements to Danielle Wilcox did not satisfy the requirements of ER 803(a)(4) and were not admissible. RP. p. 737, l. 10-25; p. 738, l. 1-20.

State's Expert Witness.

As discussed below, however, the trial judge allowed Ms. Wilcox to assume the role of expert, and she proceeded to provide testimony on the characteristics of abused children, and how those characteristics were present in M*** S****, and on the credibility of M*** S****. RP. p. 762-767.

Other Witnesses.

During trial, both sides called dueling witnesses as to what could be seen, by whom, and from what vantage point in the courtroom. These included State's witnesses, who testified that people in the Sharing Time Room could not necessarily see what was happening in the last row of chairs:

a. Ashley Denton RP p. 692-693; p. 704-707;

b. Tammy Copes, RP p. 1083-1087;

c. Arianna Pierce, RP 1106-1110.

The defense called "site view" witnesses who in general

testified that Appellant's location and activities could be seen by others in the room:

a. Steven Gonsalves RP p. 853-854;

b. Laurie Ogden RP p. 895-899;

c. Pamela Wise RP p. 923-931;

d. Paul Pecora RP p. 1042-1045;

e. Michelle Pecora RP p. 1061-1063.

Brother Gonsalves testified that he never saw anything inappropriate, and that it would be impossible for Appellant to have touched M*** in the way she described without him or someone else seeing him. RP p. 861. His ability to observe, however was limited to late July and August of 2011.

The sessions in the Sharing Time Room lasted 45 minutes each Sunday, and involved around sixty persons, including ten to twelve adults, teachers, and parents being in the room, engaged in various activities. RP p. 634, l. 5-9. People were coming and going through the Sharing Time Room at various times. RP p. 913, 914.

Appellant's students and Brother Gonsalves all sat together in the same two rows. RP p. 921 18-20; p. 847 l. 23-24. The other students sitting near to Appellant and to M*** S****

included K***** C*****, K****** O'******, and J****** K*****. RP p. 843, l. 7-11.

These three children were the only witnesses who were in a position to accurately see what was going on in the last two rows of the classroom, throughout the entire period of January through August, 2011. None of these three children were subpoenaed by the defense to testify. See Declaration of Josephine Townsend, attached to Personal Restraint Petition.

Request for View

Defense counsel requested that the court adjourn to the site of the alleged crimes, and view the scene itself. The Court refused. RP p. 1124, l. 1-15; p. 1125.

Verdicts and Sentence.

The Court found Appellant not guilty on Count I, Rape of a Child in the First Degree. Further, the court found Appellant not guilty on Count II, Child Molestation in the First Degree, which apparently was charged as some sort of a lesser included offense under count I. CP 225.

The Second Amended Information, CP 166, fails to state that counts I and II were occasions separate and distinct from each other, although this language occurs in the charging language of

counts III and IV.

The Court found Appellant guilty on Count III, Child Molestation in the First Degree, apparently based upon the testimony of sexual touching in the Sharing Time Room, and guilty on count IV, apparently based upon the alleged touching in the other classroom, although the court did not specify which incident related to which count.

On March 5, 2013, the court sentenced appellant to a minimum of 89 months in prison, the high end of the standard range, and a maximum sentence of life imprisonment. CP 208.

The Court also imposed a Sexual Assault Protection Order to be effective for 100 years. CP 262.

Further pertinent facts will be addressed in the argument on the merits below.

IV. ARGUMENT

1. ARGUMENT ON ASSIGNMENT OF ERROR NUMBER 1, 2 AND 3, AND ISSUES NUMBER 1 AND 2, INEFFECTIVE ASSISTANCEOF COUNSEL

Appellant incorporates his Motion to Consolidate his Personal Restraint Petition filed in this court. The issue of ineffective assistance of counsel requires supplementation of the

appellate record. The argument below is premised upon the appellate court granting the Motion for Consolidation.

Appellant assigns error to each of Findings of Fact numbers 1, 2, and 3. CP 225. It is reasonably likely that each Finding of Fact was the product of constitutional error occurring at trial, due to ineffective assistance of counsel.

Finding of Fact number 1 reads:

> "Between January 1, 2011 and August 31, 2011, the defendant was a Sunday school teacher in the Church of Latter Day Saints, St. John's Ward. M.L.S. was a female child in the defendant's class during that time. On or between those dates, the defendant massaged the vagina of M.L.S with his hand on at least two occasions."

Finding of Fact number 2 reads:

> On at least one occasion, the defendant touched M.L.S. in the larger "sharing time room." The defendant would often have M.L.S. sit with him in the back row of the classroom. When he would touch her, he would use his jacket to hide his actions, either putting it across their laps, or behind her. He then massaged her vagina and buttocks with his hand. He massaged her vagina and buttocks over her tights, and under her clothing, on her skin."

Finding of Fact number 3 reads:

> "Another incident occurred in the smaller classroom. The defendant had asked M.L.S. to stay behind to run an errand for him. When they were alone, he knelt in

> front of her. He asked her why she wasn't wearing her tights that day. He proceeded to massage her vagina with his hand over her dress. He asked M.L.S. if it made her feel uncomfortable when he would touch her. This incident prompted M.L.S. to tell her mother."

Appellant assigns error to these Findings of Fact, because they were the result of a flawed prosecution and defense. Appellant received ineffective assistance of counsel at trial, and the trial court committed other reversible errors.

The right to counsel in a criminal case is guaranteed by the Sixth Amendment to the United States Constitution, incorporated into State prosecutions by the Fourteenth Amendment Due Process Clause, and is contained in the Washington State Constitution, Article I, Section 22:

> "**RIGHTS OF THE ACCUSED.** In criminal prosecutions the accused shall have the right to appear and defend in person, or by counsel..."

This right is violated when a defendant is convicted of a crime, as a result of receiving ineffective assistance of counsel. Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984).

To establish a claim of ineffective assistance of counsel, a defendant must prove both that his trial attorney's representation was deficient and that the deficiency prejudiced his defense. State v. Thomas, 109 Wn.2d 222, 225-26, 743 P.2d 816 (1987).

In determining whether a defendant has met the first prong of this test, "scrutiny of counsel's performance is highly deferential and courts will indulge in a strong presumption of reasonableness." Id. at 226. Therefore, trial conduct that can be characterized as legitimate trial strategy or tactics cannot form the basis for a claim of ineffective assistance of counsel. State v. McNeal, 145 Wn.2d 352, 362, 37 P.3d 280 (2002). If the defendant meets the first burden, the second prong requires the defendant to show only a "reasonable probability" that the outcome of the trial would have been different absent the attorney's deficient performance. State v. Thomas, *supra.*

With all due respect to diligent and thorough trial counsel, certain egregious errors were made which denied Appellant a fair trial. Most glaring of these errors is the failure of defense counsel to present exculpatory evidence to the court. Bearing in mind that this was a case hinging entirely upon the uncorroborated testimony

of a ten year old girl, concerning events that were almost, by any objective standard of review, very puzzling and unlikely, presentation of all exculpatory evidence was essential.

Appellant, a 57 year old attorney and teacher, was accused of putting his hand down the clothing of the child while she was sitting in a chair next to him, in a room full of approximately 60 people, including 10 to 15 adults, while other children and even one adult were sitting next to him and the alleged victim in the row of chairs, mere feet away. The victim claimed that this occurred every Sunday for an eight month period, for 45 minutes per session.

The evidence of who could see what, and from where in the room, was contested by the diametrically opposed testimony of defense witnesses and prosecution witnesses. What is uncontested, however, is that despite the ability of adults throughout the room to see or not see what was transpiring, there were three witnesses who sat in the same rows as the crimes were alleged to occur. These child witnesses were K***** C*****, J****** K*****, and K****** O'******. These witnesses each gave interviews to Cynthia Bull, the investigating officer, who, either despite of, or because of the fact that they were exculpatory, excluded them from

her police report. RP p. 792-825. The interviews were, however, made available to defense counsel in the form of CD recordings, (exhibits 41, 42, and 43.) Transcripts of these interviews, demonstrating the exculpatory value of the testimony available from these witnesses, have been included in Mr. Whitaker's Personal Restraint Petition filed contemporaneously with this appeal.

The Personal Restraint Petition of Mr. Whitaker presents evidence addressing both prongs of the test for reversible ineffective assistance of counsel, which is addressed and incorporated herein.

Also, a review of the record of the trial itself clearly demonstrates that defense counsel at trial desired to have the contents of the three witnesses interviews presented to the court. This was not a case of a tactical decision to refrain from interviewing or calling a witness at trial.

Trial counsel's method of attempting to enter the testimony was deficient and doomed to failure, as a matter of law. It is elementary that counsel cannot enter substantive testimony from a non-appearing witness under the guise of impeachment of a

different witness. State v. Stewart, 2 Wn. App. 637, 468 P.2d 1006 (1970).

The alternate theory argued by counsel, to the effect that exculpatory hearsay can be admitted despite the strictures of the Rules of Evidence was novel and foreseeably unsuccessful, but more importantly, no substitute for the live testimony of the witnesses. Again, this was not a tactical decision. Counsel has clearly, in the trial record, RP p. 953-958, and in the Personal Restraint Petition materials, indicated that the failure to call the three witnesses, or any of them, was a failure on her part, rather than a tactical decision.

Counsel states that the decision not to call witness K***** C***** was because he had moved out of state, and the Appellant lacked funds to bring him or his family to court to testify. (Yet counsel did, in fact, call K*****'s mother and stepfather, Michelle and Paul Pecora, as witnesses.) Even if finances were a problem, there was no request to the court for a material witness subpoena, under RCW 10.55.060, whereunder costs to transport, and lodging would be paid by the state. Every defendant has available compulsory process, at no expense to the defendant to secure the attendance of a material witness.

Citing State v. Edwards, 68 Wn.2d 246, 255, 412 P.2d 747 (1966) the Court of Appeals discussed this right in State v. Eller, 8 Wn. App. 697, 508 P.2d 1045 (1973):

> "Historically, the legislature and this court have kept viable the right to compulsory process. Supplementing the court's inherent powers to compel the attendance of witnesses, RCW 2.28.010 adds a statutory authority. And RCW 10.52.040 expands these powers by requiring that all witnesses subpoenaed for the state and defense may be compelled to give evidence in open court. Rule of Pleading, Practice and Procedure 101.16W, RCW vol. 0, sets up the judicial machinery for carrying out the foregoing rules by providing for the issuance of subpoenas through court order. (Footnote omitted.) State v. Edwards, supra at 254. We find the rationale of Edwards controlling. Article 1, section 22, amendment 10 of the Washington State Constitution, RCW 10.46.050, and the sixth amendment to the United States Constitution make it clear that persons charged with a crime have a constitutional right to compulsory process to bring to trial witnesses deemed necessary for the defense. State v. Edwards, supra; Washington v. Texas, 388 U.S. 14, 18 L. Ed. 2d 1019, 87 S. Ct. 1920 (1967).
>
> As noted by Justice Hale in State v. Edwards, supra at 250:
>
> The constitution and statutes of Washington leave little room for construction concerning the right to compulsory process in criminal cases. In the 1967 case of Washington v. Texas, supra, the Supreme Court of the United States made the right to have compulsory process for obtaining witnesses in favor of the defendant in a criminal prosecution binding upon the states. When defense counsel has acted diligently to procure witnesses, and he shows their

> testimony is relevant and material to the defense, a reasonable time must be allowed to procure compulsory process. Defense counsel was diligent and has shown that the testimony of the missing witness would be material and relevant." State v. Eller, at 8 Wn.App. 702,703.

Having available the right to compulsory process to secure the missing witnesses, and having failed to utilize the available procedures, defense counsel at trial failed to prevent potentially exculpatory and dispositive evidence. There can be no tactical basis for failing to raise a potentially dispositive defense. State v. C.D.W., 76 Wn. App. 761, 887 P.2d 911. (1995).

As a matter of law, the court should conclude that trial counsel's failure to secure material, probative, and exculpatory evidence fell below the standard of effective assistance of counsel.

> "We have clearly held that defense counsel's failure to interview witnesses that the prosecution intends to call during trial may constitute ineffective assistance of counsel." Baumann v. United States, 692 F.2d 565, 580 (9th Cir. 1982).

That being said, failure to interview exculpatory eyewitnesses that the prosecution does not intend to call at trial is even worse. Defense counsel, in possession of the exculpatory evidence from the three witnesses, failed to have the interviews transcribed. Instead, trial counsel attempted to get them before the

court under the guise of playing the recordings to refresh the memory of Detective Bull, who revealed a startling failure of memory when asked about exculpatory evidence in her investigation. Counsel told the court that she wanted to impeach Detective Bull's testimony that she left nothing material out of her report and probable cause affidavit.

With the failure of that tactic, defense counsel sought to have the recordings admitted under a due process theory of admissibility of exculpatory evidence which does not meet the standards of admissibility of under the Rules of Evidence, a theory which the trial court rejected. RP p. 947, l 7-16. See Taylor v. Illinois, 484 U.S. 400, 98 L. Ed. 2d 798, 108 S. Ct. 646 (1988), holding that a criminal defendant:

> "...does not have an unfettered right to offer testimony that is incompetent, privileged, or otherwise inadmissible under standard rules of evidence." 108 S. Ct. at 653

What is clear in this case is that defense counsel recognized the value of the evidence, and wanted it presented to the court. Rather than being a tactical ploy to fail to bring the witnesses before the court, the decision was an extremely unfortunate and prejudicial mistake.

The declaration of trial attorney Josephine Townsend appended to the concurrent Personal Restraint Petition refutes the presumption that the failure to call these witnesses was a tactical decision. There is no need to speculate that she may have had a tactical reason; she unequivocally states that she did not. She had hoped to put the witnesses' testimony before the court on two implausible theories: as impeachment of Cindy Bull, and as an unrecognized due process exception to the hearsay rule. Neither was a tactical, competent decision. Both theories were doomed to failure, and her selection of doomed strategies fell below the standard of performance expected of an effective attorney in a case of such dire consequences. See Personal Restraint Petition of Ryan Whitaker, and Declaration of Mark Muenster.

The trial court refused to allow the playing of the CDs of the witnesses' interviews. Even if the court had allowed it, the testimony would not have been substantive evidence. The true value of the information provided by the three witnesses was not to impeach Detective Bull, but rather to refute and disprove the victim's testimony.

This purpose was essential to the defense. The tale presented by the State, that Appellant fondled the child under all her clothes, by reaching behind her and coming up with his hand from behind, for 45 minutes at a time, every Sunday for eight months, without her ever making a peep, and without anyone in the packed room noticing was highly improbable. It is reasonably likely that this theory would have been irreparably damaged by the three witness's testimony, that they sat in very close proximity to the parties on all those occasions, and never saw a thing. They were in the best position of anyone to see what did or did not happen, and their highly relevant and probative testimony was lost by counsel's failure to diligently interview and subpoena those three essential witnesses.

These were not merely witnesses across the room, who may or may not have been in a position to notice the improbable crimes. They were sitting next to Appellant and his claimed victim. The value of their testimony, given the offer of proof made in their police interviews, is overwhelming.

And yet, where were they at trial? The trial court himself found that the there was no showing of unavailability of the

witnesses; in other words, that trial counsel failed to demonstrate any degree of diligence in securing their presence. RP p. 958, l. 1-6. These witnesses were 8 or 9 year old children. Presumably they live with their parents. Presumably, the church has records showing the phone numbers and addresses of the parents, or emergency contacts. If the children had moved on to other schools, there must be records, subject to subpoena, showing where the school records were forwarded to. One of the three exculpatory witnesses, K***** C*****, is the son/stepson of defense witnesses Michelle and Paul Pecora, who were actually called by the defense in this trial.

There can be no tactical reason for failing to diligently track down and locate, and present the witnesses at trial. Counsel had an investigator, presumably competent in finding witnesses, appointed at public expense.

The failure to interview material witnesses constitutes ineffective assistance of counsel. Likewise, failure to subpoena third party, objective, material and essential witnesses left the Appellant in the position of having to defend himself solely his

testimony, and the testimony of friends with limited ability to observe what allegedly happened over an eight month period.

The decision whether to call a witness is generally presumed to be a matter of trial strategy or tactics. But this presumption may be overcome by showing that the witness was not presented because counsel failed to conduct appropriate investigations. *See* State v. Thomas, 109 Wn.2d 222 , 230, 743 P.2d 816 (1987).

Moreover, the failure to conduct a reasonable investigation is considered especially egregious when the evidence that would have been uncovered is exculpatory. In re Pers. Restraint of Davis, 152 Wn.2d 647 , 721, 101 P.3d 1 (2004).

In this trial, the finder of fact was forced into the uncomfortable position of having to determine credibility of witnesses. RP p. 1168, l. 24-25, p. 1169, l. 1-4. The court placed greater weight on the testimony of the child victim than on the testimony of the Appellant, although in doing so, it is clear that the court had substantial doubts about her credibility and reliability. The court suppressed statements by the victim to the church bishop and his group; to the prosecution's retained physician, Dr. Copeland; and to unlicensed counselor Danielle Wilcox, all on the

basis that the statements were not reliable, and did not qualify for admission under RCW 9A.44.120, nor ER 801(c)(4).

From the record, it is manifest that the trial court was not overwhelmed with the victim's credibility, as the court acquitted the Appellant on counts I and II. This is not a case of overwhelming evidence, where defense counsel's ineffective assistance and the deprivation of the constitutional right to effective counsel can be classified as harmless beyond a reasonable doubt. The exculpatory testimony of the three children from the class, who sat in close proximity to the Appellant and M*** S**** during the Sharing Time Room sessions, could easily have tipped the reasonable doubt scales in Appellant's behalf.

It appears that the Sharing Time Room incident is the subject of Count III. That conviction and the failure to present testimony of the three children also taints Count IV, the "small classroom" incident allegation. Although the three child witnesses would have nothing to say about that charge, it is obvious that the trial court's finding of guilty on count III must have been taken into consideration when deliberating on count IV. One would act as a similar act to show common scheme or plan. ER 404(b). It is highly

likely that if the trial court acquitted on Count III based upon the testimony of the three children, an acquittal on Count IV would probably have followed. The Appellate court cannot conclude otherwise upon this record.

Appellant is entitled to a new trial, with effective counsel presenting the exculpatory testimony of K*****, J****** and K******, which was lacking from the first trial, for no justifiable reason.

In the alternative, if the appellate court is not convinced from the available record, (scarce as it is due to counsel's failure to interview and call the witnesses at trial) as to the true value of the three witnesses' testimony, a reference hearing should be ordered, pursuant to the Personal Restraint Petition, to allow development of the record that was foregone due to ineffective assistance of counsel.

2. ARGUMENT ON ASSIGNMENT OF ERROR NUMBER 4, AND ISSUES 3 AND 4; INADMISSIBLE OPINION AND PROFILE/ SYNDROME EVIDENCE BY UNLICENSED THERAPIST

As discussed above, the State called Danielle Wilcox, a "counselor" from an agency known as the Children's Center as a witness in a failed attempt to elicit hearsay testimony as to what M*** S**** may have told Ms. Wilcox in counseling sessions. Her

testimony was offered under a hearsay exception under ER 803 (a)(4).

The trial court correctly excluded all the statements to Ms. Wilcox as hearsay, which did not qualify under the exception. The State failed to prove the existence of a "treatment motive," which a cornerstone of reliability of such statements. State v. Carol M.D., 89 Wn. App. 77, 948 P.2d 837 (1997).

Danielle Wilcox had been listed as a State's witness on its witness list, and a copy of a report written by her had been provided. It was anticipated by the State and the Defense that she would be a fact witness, testifying as to statements made by the victim. She was not, however, identified as an expert witness, nor had any credentials necessary for her qualification as an expert been provided. Despite this fact, the State, after the evidence it expected to present was excluded, changed course and claimed that she was an expert, RP p. 738, l. 22-25; p. 739, l. 1-7, who would be called to testify as to "traumagenic dynamics." RP 762, l. 14-25, p. 763

The defense strenuously objected to this sleight of hand, whereby the State transformed a disclosed fact witness into an

undisclosed expert witness. The term "traumagenic dynamics", as can be seen from the testimony, is nothing more than a disguise for the disfavored and inadmissible concept of "child sexual abuse syndrome." The trial court overruled the objections, and permitted Ms. Wilcox to testify as an expert. A review of her testimony discloses the following:

1. She is not a licensed therapist, but rather is a "registered counselor;" RP p. 721, l. 12-17.

2. Her certification allows her to: "practice counseling and therapy services for children and families legally." RP p. 721, 21-23.

2. Apart from having a Master's degree in "counseling psychology" there is no indication of her training and experience, nor qualifications to testify as an expert in this type of case.

3. There is no indication that she has ever testified in court before, nor been recognized as, or permitted to testify as an expert.

4. Her current (at the time of trial) "task" was: "I work with children who have been sexually abused or experienced trauma in their past under a grant called the Child Sexual Abuse Treatment Program." RP p. 722, l. 10-14.

4. Her specific training consisted of:

> "Okay. And do you have specialized training in dealing with sexual abuse in particular?
>
> A: I do. I have gone to the Wicksap (ph), Washington Child Sexual Abuse Coalition Corp Training to treat children who have been sexually abused and have had continued professional development in the area. Most recently attending the Child Abuse Summit. RP 715, l. 9-23.

5. She knows about a theory about the general symptoms that present after someone has experienced abuse.

> "Q: Thank you. So Ms. Wilcox and specifically in your sessions with M*** S****, did you have an opportunity to make any observations with regard to something called traumagenic dynamics?
>
> A: Yes.
>
> Q: And specifically what are traumagenic dynamics in your training and expertise.
>
> A: Yes. traumagenic dynamics are – well there's four specific traumagenic dynamics outlined by David Finklehore (ph), PhD and Angela Brown, PhD.
>
> And it's stigma, powerlessness, traumatic sexualization and betrayal.
>
> And these are four symptoms or dynamics that come up for children who have experienced sexual abuse." RP p. 762, l. 14-25; p. 763, l. 1-4.

7. There is no testimony in the record whatsoever that the theory

of "traumagenic dynamics" has achieved general acceptance in the scientific community.

8. She testified that when a child comes to her and tells me they've been abused, (such as M*** S****) she believes them. RP p. 732, l. 14-17.

9. She "observed" all four "traumagenic dynamics in M*** S****. RP p. 764, l. 23-25; p. 765, l. 1-4.

10. She testified that M*** was abused by her teacher:

> "Q. And so what did come up repeatedly with regard to betrayal?
>
> A: The – the feeling or idea that someone that M*** felt she could trust or was put in a position of authority and a position that most children look up to – it being a teacher.
>
> And that that person violated her boundaries and was not – that's not the way you expect a teacher to treat you as a child and someone who she thought she could trust, so violated that trust by engaging in sexual abuse acts.
>
> And that is the form that betrayal took for M***.
>
> Q: And M*** specifically addressed that with you? A: Yes." RP p. 774, l. 14-25; p. 775, l. 1-3.

No witness may testify as to a personal belief of another witness. State v. Sutherland, 138 Wn. App 609, 158 P.3d 91

(2007). No expert may testify as to the ultimate issue in a sex abuse case (guilt or innocence) when such testimony is based upon an evaluation of the credibility of the victim. State v. Fitzgerald, 39 Wn. App. 652, 694 P.2d 1117 (1985).

In State v. Maule, 35 Wn. App. 287, 667 P.2d 96 (1983), a conviction for Statutory Rape was reversed, because State's witness Ousley, an expert on child sexual abuse had testified that most of such crimes are committed by "father figures" in the home. This profiling of the perpetrators of such crimes was reversible error under several cases cited by the court. The court then discussed the admissibility on retrial of the expert's testimony relating to common characteristic behaviors of victims of such crime. (Parenthetically, it cannot be argued that such testimony is offered for any other purpose than to infer that a crime occurred, as described by the alleged victim.) The court stated:

> "For example, Ousley's theory that sexually abused children manifest particular identifiable characteristics was not shown to be supported by accepted medical or scientific opinion. CF. State v. Mulder, 29 Wn. App. 513, 515, 629 P.2d 462 (1981) ("'battered child syndrome'"). If no correlation between particular characteristics and established cases of sexual abuse is shown (through Ousley's own scientific study or other professional studies),

> such testimony amounts to a discussion of child sexual abuse in general and is therefore collateral to the question of whether a particular child was sexually abused. See State v. Barry, 25 Wn. App. 751, 760, 611 P.2d 1262 (1980) (testimony of expert on "the general subject of the reliability of eyewitnesses"). Under such circumstances, a trial judge could reasonably conclude the proffered testimony lacks sufficient probative value to "assist the trier of fact" as required by ER 702.
>
> Even if Ousley's theory possesses probative value, in the abstract, the record does not show the underlying facts or data are of a type "reasonably relied upon by experts in the particular field". ER 703. There is no evidence that Ousley conducted any statistical study or that any other expert in the field made such a study. There is no evidence that people working in the field attach particular significance to one or more characteristics and whether certain broad characteristics noted by Ousley, E.G., "nightmares," are, without further explanation, considered adequate indicia of child sexual abuse. Nor is there evidence showing how, for Ousley's analysis, a case of child sexual abuse is established. Is it by criminal conviction, agreement to accept treatment, admission by the defendant, or someone's opinion? What is the basis of analysis employed by other professionals in the field?"

The type of offending testimony in Maule, and presented in the Whitaker prosecution was likewise disapproved in State v. Jones, 71 Wn. App. 798, 863 P.2d 85 (1993), which, while acknowledging a split of authority and vigorous debate across the nation, held that this type of "syndrome" testimony was subject to the test promulgated in Frye v. United States, 293 F. 1013 (D.C.

Cir. 1923) and not admissible unless there was a foundation laid demonstrating general acceptance in the pertinent scientific community:

> "Accordingly, a substantial number of courts have noted that expert testimony regarding a profile or syndrome of child sexual abuse victims is not admissible to prove the existence of abuse or that the defendant is guilty. See State v. Michaels, 264 N.J. Super. 579, 625 A.2d 489 (1993); State v. J.Q., 252 N.J. Super. 11, 599 A.2d 172 (1991); Commonwealth v. Dunkle, supra; State v. Rimmasch, supra; People v. Jeff, 204 Cal. App. 3d 309, 251 Cal. Rptr. 135 (1988); People v. Beckley, 434 Mich. 691, 456 N.W.2d 391 (1990); State v. York, supra; State v. Schimpf, 782 S.W.2d 186 (Tenn. Crim. App. 1989). This evidence has been distinguished from battered child syndrome. See 68 Neb. L. Rev. at 67; State v. Rimmasch, 775 P.2d at 400; Commonwealth v. Dunkle, supra at 178. Such testimony has also been analogized to "rape trauma syndrome" testimony such as that found inadmissible in Black. See Jeff, at 333; Beckley, at 722-23.
>
> Because the use of testimony on general behavioral characteristics of sexually abused children is still the subject of contention and dispute among experts in the field, we find that its use as a general profile to be used to prove the existence of abuse is inappropriate. However, we agree with the current trend of authority that such testimony may be used to rebut allegations by the defendant that the victim's behavior is inconsistent with abuse. See, e.g., State v. J.Q., supra at 30, 31-32 and cases cited therein; People v. Nelson, 203 Ill. App. 3d 1038, 561 N.E.2d 439 (1990); People v. Beckley, supra; People v. Jeff, supra. We further note that sexual acting out behavior has been viewed as more logically and clinically indicative of sexual abuse than other

> generalized reactions to emotional traumas such as nightmares and phobic behaviors. See 68 Neb. L. Rev. at 59-60.
>
> We find a majority of other jurisdictions have reached a similar resolution with regard to generalized testimony of behaviors of abused children. A number of courts have found that testimony regarding the behaviors of a class of abused children is not sufficiently established to meet the Frye standard or an equivalent test for scientific reliability under ER 702. See People v. Jeff, supra; State v. Schimpf, *supra;* State v. York, *supra*; State v. Rimmasch, *supra;* Commonwealth v. Dunkle, *supra*."

The surprise testimony of "expert" Danielle Wilcox violated all the concerns expressed above on multiple levels. She testified that she believed the children (by process of logic, including M*** S****) who come to her and claim to have been sexually abused, She testified that M*** S**** had suffered sexual abuse. She testified that M*** S**** had suffered sexual abuse at her church. She testified that M*** S**** had suffered sexual abuse by a trusted teacher. She testified that the trusted teacher had violated her boundaries and violated that trust by engaging in sexual abuse acts.

Danielle Wilcox, the untested and previously unrecognized expert presented scientifically unproven syndrome evidence

disguised with the odd and fanciful psychobabblic moniker of "traumagenic dynamics," and that these "dynamics" "came up" commonly, whatever that means, in sessions with M***.

This junk science type of testimony is exactly the evil to be addressed in a Frye hearing, however the surprise tactic of the State in morphing Ms. Wilcox from a fact witness to an "expert" and the failure of the defense to object to the testimony resulted in violations of the Appellant's constitutional right to confront witnesses, to due process inherent in the discovery rules, and of course, the right to effective assistance of counsel.

3. ARGUMENT ON ASSIGNMENT OF ERROR NUMBER 5 AND ISSUES NUMBER 3, 4, AND 5: INADMISSIBLE OPINION AND PROFILE/SYNDROME EVIDENCE BY UNLICENSED THERAPIST, AND INEFFECTIVE ASSISTANCE OF COUNSEL

It is anticipated that the State in response will argue that the objections to the testimony of Danielle Wilcox were waived by trial counsel's failure to make such objections at trial. Trial counsel was caught off guard, as is evident from the transcript. She expected to be confronted with a fact witness, and she was well prepared for, and prevailed in her objection to the admissibility of Wilcox's testimony under ER 803(a)(4.) Thereupon, she was blindsided by the State's presentation as Wilcox as an expert and the court's

permitting the testimony as such. It is Appellant's position that the error, arising under these unforeseen circumstances, was sufficiently preserved by Ms. Townsend's strenuous objections to allowing the so-called expert testimony.

In the event, however, that the State argues that Ms. Townsend waived the error by her conduct, the appellate court should conclude that:

1. This error can be raised for the first time on appeal, and also

2. Such a default on trial counsel's part would constitute ineffective assistance of counsel.

1. Error raised for first time on appeal. A witness's opinion on the credibility of another witness, especially the uncorroborated victim, affects the constitutional right to a jury trial, and Appellant urges, the constitutional right to a trial by the court in lieu of a jury, and may be raised for the first time on appeal under RAP 2.5(a)(3). Please recall that the only evidence of a crime was from the mouth of the alleged victim, who had given several inconsistent versions. The court found that prior to trial she had been interrogated by several people in a manner which affected the credibility of her accusations, and the trial court excluded several

unreliable statements from the child. The trial court did not believe the child on the Rape charge and acquitted the appellant, and also acquitted on one count of Child Molestation.

The Appellant adamantly disputed the charges, and defense witnesses testified that commission of the crimes, undetected, was an impossibility.

Under these circumstances, the appellate court can have no confidence that Judge Lewis was not influenced by the testimony of Danielle Wilcox that M*** S**** suffered from the "syndrome" or "traumagenic dynamic" of child molestation, and that Ms. Wilcox believed her. This type of credibility-vouching evidence violated the Appellant's constitutional right to a fair trial, by invading the province of the fact-finder. It is constitutional error which may be raised for the first time on appeal. State v. Kirkman, 126 Wn.App 97, 107 P.3d 133 (2005).

2. Ineffective assistance of counsel. Appellant repeats all the general observations made above concerning such a claim under Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984) and State v. Thomas, 109 Wn.2d 222 , 230, 743 P.2d 816 (1987), *supra*, and other authorities cited above.

Ms. Townsend, surprised as the records reveals she was, and objecting to the testimony in its entirety, made no tactical decision to waive any objection to the inadmissible, unconstitutional testimony of Danielle Wilcox. The law is clear that such testimony is inadmissible, and if a waiver occurred, it was ineffective assistance to do so.

4. ARGUMENT ON ASSIGNMENT OF ERROR NUMBER 6 AND ISSUE NUMBER 6: ABUSE OF DISCRETION BY NOT VIEWING THE SCENE OF THE ALLEGED CRIMES

CrR 6.9 permits the court to allow a jury view of premises involved in a prosecution. There is no reason to believe that the court itself in a bench trial may not do the same. The mere existence of the rule is an indication that such a procedure can be helpful to a fair adjudication of the issues.

Appellant concedes that the instances wherein an appellate court will reverse for failure to afford (or in this case to take) a view of the crime scene are few and far between. The decision to engage in a view is discretionary, and only an abuse of that discretion constitutes reversible error. State v. Land, 121 Wn.2d 494, P.2d 678 (1993). Defense counsel at trial, recognizing the confusion created by the dueling viewpoint witnesses of the

prosecution and the defense, brought a well reasoned motion. The particular, unique, and odd circumstances of this case mandated such a view. The court received directly contradictory evidence as to who could see what, and from where. This is a case where up to 60 or more people were crammed into one room, in close proximity to each other, and no-one saw a thing, over nine months and at least four sessions per month of alleged continuous shocking sexual abuse. A major issue in the case was what could other people see in the room, and just as important, what would Appellant perceive that other people could see?

To understand the testimony, it was incumbent in this particular and unusual case, for the court to judge that testimony in a three dimensional world.

One reason for denying a view of the premises is that it would be disruptive to transport a jury, lawyers, the defendant, custody officers, the bailiff(s), the clerk, and the judge to another location away from the courtroom, as well as the possible event of jury contamination. Also, the scene could be much different than it was at the time of the alleged offense.

None of those concerns existed in this case. There was no jury. There were no bailiffs. There were no custody officers. The scene was static—one that had been in use in the same configuration for years. The view could be accomplished with one judge, two lawyers, one defendant, and one clerk. Any potential contamination would easily be ignored by the experienced trial judge. If a picture is worth a thousand words, then a view in the world of reality is worth a thousand pictures.

A view of the premises in this case would not constitute the receipt of new evidence, as decried in State v. Fricks, 91 Wn.2d 391, 588 P.2d 1328 (1979). Instead, the evidence and testimony as to visibility in the Sharing Time Room was replete throughout the record, and was contradictory and confusing. A view could only serve to clarify and dispel that confusion. Given the clear certainty that a view would have been extremely helpful to the truth finding process, and to the judge in assessing the testimony, and given that there was essentially no cost or risk involved in conducting the view, this unique case should be the rare exception where the appellate court can find error.

5. ARGUMENT ON ASSIGNMENT OF ERROR NUMBER 7, AND ISSUE NUMBER 7; EXCESSIVELY LENGTHY SEXUAL ASSAULT PROTECTION ORDER

The Sexual Assault Protection Order CP__, issued by the Court is void on its face. The order provides on page one:

> "This Post Conviction Sexual Assault Protection Order expires on 4/5/2113."

Such an order, however, according to RCW 7.90.150 (6)(c) has a specific longevity, which cannot be measured at the time of issuance:

> "A final sexual assault protection order entered in conjunction with a criminal prosecution shall remain in effect for a period of two years following the expiration of any sentence of imprisonment and subsequent period of community supervision, conditional release, probation, or parole."

It is mystery how the drafter of the order came up with a termination date one hundred years into the future. The date has no connection with the indeterminate duration set out in the statute. While the error may be academic, it is nonetheless clear and obvious error which should be remedied. The order is void on its face.

V. CONCLUSION

Appellant was convicted of disturbing and heinous crimes, based upon the uncorroborated testimony of a ten year old girl,

who had made numerous prior inconsistent statements, and had been hounded into making unreliable accusations by a bishop, physician and aspiring therapist.

The trial court found her testimony about dozens of incidents of sexual penetration to be insufficient evidence to convict on the charge of Rape.

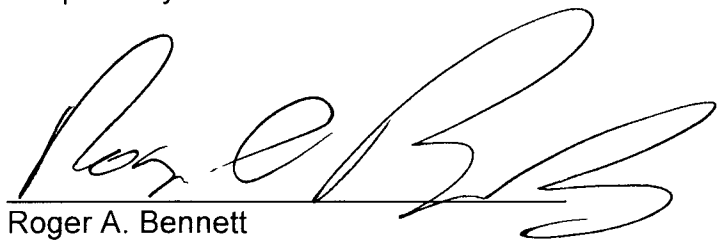
Defense counsel unfortunately dropped the ball by failing to secure and present testimony which could probably have changed the result, and by failing to object to patently inadmissible and prejudicial pseudoscientific gibberish from an unqualified counselor.

The trial court erred in failing to view the scene, to clarify the confusion created by conflicting witnesses, and further erred by issuing a protection order with no relation to the statutory mandate as to calculation of duration.

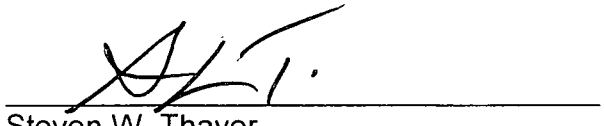
Appellant requests that the appellate court reverse both convictions and judgments.

DATED the _____ day of September, 2013

Respectfully submitted



Roger A. Bennett
Attorney for Petitioner
WSBA # 6536



Steven W. Thayer
Attorney for Petitioner
WSBA # 7449

Address of Attorney for Respondent, State of Washington:

Anne M. Cruser, WSBA # 27944
Deputy Prosecuting Attorney
1013 Franklin Street
Vancouver, WA 98660
(360) 397-2261

Updated Address for Appellant:

Ryan Whitaker # 363843
Coyote Ridge Corrections Center
Unit E, Cell A43-IL
PO Box 769
1301 N. Ephrata Avenue
Connell, WA 99325

COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON, Respondent, vs. RYAN DEE WHITAKER, Appellant	No. 44842-4-II PROOF OF SERVICE OF CORRECTED OPENING BRIEF OF APPELLANT

I hereby certify, under penalty of perjury under the laws of the State of Washington, that on the date set out below, I caused a true and accurate copy of the CORRECTED OPENING BRIEF OF APPELLANT to be served on opposing counsel listed below, by personal service upon her place of business:

Anne M. Cruser
Deputy Prosecuting Attorney
1013 Franklin Street
Vancouver, WA 98660

And upon Appellant by U.S. mail, postage prepaid, to:

Ryan D. Whitaker
Coyote Ridge Corrections Center
Unit E, Cell A43-IL
PO Box 769
1301 N. Ephrata Avenue
Connell, WA 99326

DATED the 16 day of September, 2013

Roger A. Bennett WSBA # 6536
Attorney for Defendant

Roger A. Bennett, Attorney at Law
WSBA # 6536
112 W. 11th Street, Suite 200
Vancouver, WA 98660
(360) 713-3523