No. 44566-2-II

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

STATE OF WASHINGTON,

Respondent,

v.

KELVIN K. MARSHALL,

Appellant.

ON APPEAL FROM THE
SUPERIOR COURT OF THE STATE OF WASHINGTON,
PIERCE COUNTY

(No. 11-1-03626-1)

The Honorable Vicki L. Hogan, Judge

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A. ASSIGNMENTS OF ERROR

1. Appellant Kelvin Marshall was deprived of his rights to jury trial when the prosecution was allowed to admit, over defense objection, multiple statements by officers conveying their opinions of Marshall's veracity, credibility and guilt.

2. Marshall was deprived of his Sixth Amendment and Article 1, § 22, rights to effective assistance of appointed counsel when counsel first successfully moved to exclude highly prejudicial opinion evidence and then failed to take minimal steps to ensure that the court's ruling was followed.

3. The prosecutor committed flagrant, prejudicial and ill-intentioned misconduct in telling the jury that they had to decide who was lying in order to decide guilt or innocence.

   Further, counsel was again ineffective in failing to object or make an attempt to minimize the damaging effect of the improper argument.

4. The sentencing court exceeded its statutory authority and violated Marshall's First Amendment and due process rights in imposing improper conditions of community placement. Marshall assigns error to the following conditions contained in the judgment and sentence, Appendix H:

   13. You shall not possess or consume any controlled substances without a valid prescription from a licensed physician.

   . . . .

   21. Do not possess or peruse any sexually explicit materials in any medium. Your sexual deviancy treatment provider will define sexually explicit material. Do not patronize prostitutes or establishments that promote the commercialization of sex.

CP 218-19.

5. The sentencing court acted without statutory authority in ordering forfeiture of property based solely upon conviction of an offense, in violation of RCW 9.92.110.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Did the trial court err and abuse its discretion in admitting, over defense objection, several declarations of interrogating officers expressing their opinions that he was not telling the truth and that they would prove it?

   Further, is reversal required because the prosecution cannot meet the heavy burden of proving the constitutional error harmless beyond a reasonable doubt?

2. For more than 20 years, Washington courts have condemned the argument that the jury must decide the victim is lying in order to decide the case in the defendant's favor as a "false choice," because the jury's role is not to decide who is lying but instead solely to decide whether the prosecution has proved its case, beyond a reasonable doubt.

   After the prosecutor suggested that the issue before the jurors was whether the victim was lying, counsel argued that no one had to be lying and it was possible one of them might be mistaken. Was it flagrant, prejudicial and ill-intentioned misconduct for the prosecutor to then declare that counsel was wrong, that either the victim or the defendant had to be lying and that the jury was required to decide between only those two options?

   In addition, if the Court finds that the misconduct could potentially have been cured, was counsel further ineffective in failing to object to this misconduct?

3. The Legislature authorized a sentencing court to impose a condition of community custody prohibiting consuming or possessing controlled substances without a valid prescription, but did not limit the medical personnel from whom such a prescription must be issued.

   Did the sentencing court err and was the condition limiting Marshall to prescriptions from "a licensed physician" unauthorized where it is lawful in this state for many other types of medical personnel to issue prescriptions and the Legislature has not chosen to impose such a limitation?

4. Where there was no evidence that "sexually explicit materials" or "establishments that promote the commercialization of sex" were involved in the crime, was it outside the trial court's statutory authority to impose a condition of community custody which prohibited Marshall from possessing such materials or patronizing such

establishments?

Further, did those conditions fail to satisfy due process requirements by failing to give any notice of which establishments might meet the definition of promoting the "commercialization of sex" and delegating to the sexual deviancy provider what amounted to "sexually explicit material," so as to allow for arbitrary enforcement?

5. The authority to forfeit property is wholly statutory and is granted to law enforcement agencies in certain cases, provided they follow the requirements of the relevant statute. Did the sentencing court act without statutory authority in ordering forfeiture of property as a condition of the sentences when there was no evidence the statutory procedures had been followed?

6. RCW 9.92.110 abolished the doctrine that a criminal defendant was subject to forfeiture of his property simply because of being convicted of a crime. Did the order of forfeiture, based solely upon conviction, violate this statute?

C. STATEMENT OF THE CASE

1. Procedural Facts

Appellant Kelvin K. Marshall was charged by information with first-degree burglary with a sexual motivation aggravating factor and one count of fourth-degree assault. CP 1-2; RCW 9.94A.030; RCW 9.94A.533; RCW 9.94A.835; RCW 9A.36.041(1) and (2); RCW 9A.52.020(1)(b). Pretrial and trial proceedings were held before the Honorable Judge Vicki L. Hogan on September 24, November 1 and December 14, 2012, January 3, 10, 15-17, 2013.[1] At the end of the trial, the court granted Marshall's motion to dismiss the fourth-degree assault,

[1]The verbatim report of proceedings in this case consists of five volumes, which will be referred to as follows:
the volume containing the proceedings of November 1, 2012, as "1RP;"
the four chronologically paginated volumes containing the proceedings of September 24 and December 14, 2012, January 3, 10, 15-17 and February 22, 2013, as "RP."

prior to the case going to the jury. RP 428. The jury then convicted Marshall of the burglary and of the aggravating factor. CP 193-95.

On February 22, 2013, Judge Hogan imposed a standard-range minimum sentence of 20 months for the underlying offense, consecutive to 24 months for the "sexual motivation" sentencing enhancement. CP 201-16; RP 499. Marshall appealed and this pleading follows. See CP 220.

2. Testimony at trial

Tasha Ann Church and Eddie Sumlin were living together in an apartment in Tacoma on September 2, 2011, when a man Church did not know knocked on her door at about 7:40 or 7:50 in the morning, after Sumlin left for work. RP 216-17, 222, 226, 228. The man at the door said "Vincent" - the manager - had told him to check the pipes, after which the man put his hand on the door and walked in. RP 229. Church and Sumlin had some problems with their plumbing in the bathroom the week before, so they had told the manager about it. RP 226. Church had thought, however, that the manager had already fixed it. RP 226.

At trial, she would claim things seemed "a little off," but she went back to working on her computer anyway as he went into the bathroom, carrying a sort of utility bag. RP 231.

From the bathroom, he started making conversation, asking her name and where she was from. RP 232. Although at trial she said she was not "comfortable" with the questions, she answered them and the conversation went on. RP 233. Church said she "felt bad" because, when he asked her name, she had said, "why do you need to know that" and he had then responded, "oh, I'm sorry. I'm just trying to make conversation."

RP 233.

According to Church, the questions were personal, so at some point she brought up that she had a boyfriend. RP 233. He continued talking, however, and she focused back on her work. RP 234. He then said he was going to check the pipes in the kitchen. RP 234. After a moment she realized there was no problem with the pipes in the kitchen, so she started to think he was not a maintenance man. RP 234.

According to Church, the man then came out of the kitchen holding a wrench. RP 234. He sat down on the bed next to her, "stroking the wrench." RP 234. Church said he looked at her for a moment, touched her hair and started massaging her shoulder and said, "you look tense." RP 235.

Church did a karate-type chop in the air between them and said, "you need to stop." RP 235. She was concerned because, from where she was sitting, she would not be able to get to the door without going by him. RP 235, 238. He then asked if she was happy in her relationship and whether she would call him if he gave her his number. RP 237. When she said she was very happy and would not call, he said she had very nice feet, looking at them and then trying to grab and massage one. RP 238. Church put her hand in the air and said again, "[y]ou really need to stop." RP 238.

At that point, the man immediately dropped her foot and stared at her for a second. RP 238. She said, "you need to focus on your work, and I need to focus on what I'm doing." RP 238. He then got up and went back to the bathroom. RP 239.

Church shut her computer, got her shoes, purse, and the proof of

her book, put the proof in a bag, and then, after that, went out the door. RP 239. As she was leaving, she said, the man asked if her boyfriend "goes down" on her because "he would." RP 240. She did not respond, instead just running out. RP 240.

At trial, Church admitted that she personally believes that the most "common crime to happen to women is that they be raped," and she has written about that belief in her "blog." RP 262-63. She still did not think she might have misinterpreted the man's intentions that day. RP 264.

Church was running to the stairs when he came out the door and asked, "are you leaving?" RP 240. She did not say anything and thought it was "visible" that she was upset. RP 240. The apartment manager and his wife were at the bottom of the stairs and Church ran down and confronted them, asking, "who are you hiring?" RP 241. After a moment, it was established that the manager had not hired anyone. RP 241. The manager then ran up the stairs towards Church's apartment and the apartment manager's wife called the police. RP 241-42.[2]

The manager later would pick a picture out of a photographic montage, indicating that he had seen that person that day. RP 373. Church also picked out the same picture, for a man named Kelvin Marshall. RP 248.

Shannon Glen, who lived at the apartment complex, testified that, at about 9 p.m. the night before, she saw someone walk past her when she was outside smoking and did not recognize him as living there. RP 285-

[2]Although both were apparently subpoenaed, the prosecutor could not find either the manager or his wife to have them testify.

88. Glen's friend then asked the man, "hey, what are you doing," and the man "kind of put his head down and said, 'I'm with maintenance,'" then walked down the stairs and went into a propped-open basement door. RP 288. Glen said the man came out a few minutes later. RP 289.

On cross-examination, Glen admitted that, just the day before, she had told a defense investigator that she had seen the person between 4 and 5 in the late afternoon, before the sun went down. RP 293. She explained her testimony that it was much later by saying the prosecutor had, in the interim, reminded Glen that Glen had told police it was at about 9. RP 293.

Glen thought the man she saw looked young and was tall, skinny and black. RP 290. She did not think she would be able to identify him because it was "such a brief encounter." RP 290. Officers never gave her the opportunity to try, instead not showing her a montage to see if she would think the man she had seen looked at all like Marshall. RP 380.

The morning of the incident, another neighbor in the apartments said he saw someone drive up kind of fast, park, talk on a cell phone and "mill" around his car and another parked vehicle for awhile. RP 301, 314. The man then went to the back door of the apartments, after which he came back, grabbed a duffle bag from the car and got out a crescent wrench. RP 301. The neighbor opined that a crescent wrench was not a proper tool for "pretty much any job" and that it seemed weird to see "a brand new crescent wrench, and this clean cut black kid." RP 301. He saw the kid grab the wrench and appear to call someone on the phone and then the male went out of view. RP 301. About five minutes later, the

apartment manager came running by and the neighbor ultimately pointed the manager and police to the car, telling them about seeing the black "kid." RP 302.

That neighbor was not able to identify Marshall as being involved. RP 308. The car, however, was registered to Marshall, which is why his picture was included in the montage. RP 333.

Sumlin testified that, when he was drinking his tea about five minutes before leaving the home that morning, he had looked out the window and saw someone "sort of pacing" in front of a recreational vehicle, sometimes talking on the phone. RP 273-74, 282. When he and Church spoke after the incident, they thought it might be the same person. RP 279.

The next day, Marshall was arrested. RP 340. He was carrying personal items including a couple of condoms. RP 340. Marshall's wife let police search their home and none of the toolboxes looked like the one Church said Marshall had. RP 370.

Marshall was interrogated by Detectives Keith Miller and Brad Graham of the Tacoma Police Department. RP 355, 360. During the interrogation, an edited transcript of which was read to the jury, Marshall said he had a fight with his wife, left the home and was at the apartment complex talking on the phone to his pastor when some "dude" came out of the apartments and started grabbing at him, apparently mistaking him for

someone else. Ex. 23 at 11-15;[3] see RP 365. Marshall told the guy that he had the wrong man and got away. Ex. 23 at 11-16. He ran two blocks and then walked to his house, after which he called his wife to tell her what had happened. Ex. 23 at 11-16. He walked back to get his car and there were police cars there. Ex. 23 at 16.

Over defense objection, the jury would later hear that Officer Miller asked Marshall why he had not talked to police about what had happened right then. Ex. 23 at 16. Marshall responded, "like, I was, I'm tellin' the dude like it's not me and he still, like, um, trying to reach me and stuff[.]" Ex. 23 at 16. He said it was because it had seemed like the guy was chasing somebody, so when the guy grabbed him Marshall had said, "it wasn't me, it's not me." Ex 23 at 17.

At that point, the officers confronted him, saying that neither of them thought he was being "totally honest with us in the first go-around." Ex. 23 at 25. Marshall ultimately told police that he had been in an argument with his wife earlier that day and had gone driving, ending up parked at the apartment complex. Ex. 23 at 23-28. He said that he had been sort of working on his car in the parking lot of the apartment complex, because something was wrong and "probably steering" was making some noise. Ex. 23 at 28, 32. He saw the gate was open at the

[3]Based on the trial court's pretrial ruling that the statements Marshall made during the interrogation were admissible, the prosecutor had the transcript of that interrogation read into the record. RP 422. There were apparently no objections made in the courtroom while the reading occurred, and the version of the interrogation read to the jury was edited to remove improper matters, such as reference to other allegations. RP 422; see Ex. 23. A supplemental designation of clerk's papers is being filed to have the exhibit transmitted to the Court. Because exhibits are usually not separately indexed as to page when so transmitted, for clarity the page number of the exhibit is used herein.

apartment and was still carrying his tools when he went to the door of the nearby apartment and knocked. Ex. 23 at 28-33. He did not know who would answer and was not sure why he had knocked. Id.

Marshall said that, when Church answered the door, he did not really know what to say, so he said he was the plumber and chatted with her while she directed him to the bathroom. Ex. 23 at 28, 34. She commented on his accent and he told her he was from the Carribean, and she said she had been there on a cruise. Ex. 23 at 28. He asked about it and she said it was with her boyfriend. Id.

Marshall said Church talked about her relationship, how she had met her boyfriend when he was young and they had lived together for two years. Ex. 23 at 29.

Marshall had a CD of Carribean music in his car and asked her if she liked that kind of music. Id. at 28, 41. When she said she did, he went to his car to get it and came back, giving it to her. Ex. 23 at 28. He said she could not get the CD drive to work and was sitting on the bed, so he asked if she wanted help and he sat next to her and showed her how to work it, although it did not end up working. Ex. 23 at 29, 42. Church had gotten a pedicure and put her feet up for him to look at, so he said she had pretty nice toes. Ex. 23 at 29. She was raising her leg up when he touched her toes and started looking at her. Ex. 23 at 40. He also thought he touched her "hair and stuff" from the back, through her shirt. Ex. 23 at 37, 42.

Church said something about how she liked her boyfriend and did not "like cheating on him," so "[l]et's set boundaries." Ex. 23 at 29, 37.

At that point, Marshall ent back to the bathroom to get his bag and leave and then she had her purse and was leaving at the same time. Ex. 23 at 29, 35. He asked where she was going and she said "to Seattle and stuff." Id. He asked her if she wanted him to lock the door and she said, "[y]eah, sure." Ex. 23 at 29.

Marshall thought that, when she left, Church seemed like she was "still good" in terms of her mood. Ex. 23 at 37. Graham asked if she seemed scared and Marshall said, "[h]uh? No, she didn't look like it." Ex. 23 at 38.

Marshall did not know really why he had gone to the door, saying he was frustrated and he and his wife were "just like arguing all the time." Ex. 23 at 43. When asked by Miller what was his "intention" when she opened the door, Marshall said he did not know who was going to answer, who was there and really did not know what to say. Id. He did not know if he was just looking for someone to talk to or not. Id.

Marshall was clear that he was not at the apartment complex the night before. Ex. 23 at 65. He was ultimately arrested after he turned himself in to his first sergeant at Joint Base Lewis-McChord. Ex. 23 at 45.

Officers never tried to verify Marshall's description of what he had been doing the night before the incident. RP 379. It was stipulated that none of Marshall's fingerprints were on the CD or the computer, but Church's were on the CD she claimed never to have seen before. RP 426.

D. ARGUMENT

1. IMPROPER OPINION EVIDENCE WAS ADMITTED IN VIOLATION OF MARSHALL'S RIGHTS TO A FAIR TRIAL AND COUNSEL WAS INEFFECTIVE

Both the state and federal constitutions guarantee the right to trial by jury. See State v. Lane, 125 Wn.2d 825, 838, 889 P.2d 929 (1995); Sixth. Amend.; Art. I, § 21. Included in this right is the right to have the jury serve as the "sole judge" of the evidence, the weight of the testimony and the credibility of witnesses. Lane, 125 Wn.2d at 838. As a result, it is improper to admit evidence about an officer's opinion about the guilt, credibility or veracity of the defendant. See, e.g., State v. Montgomery, 163 Wn.2d 577, 591-94, 183 P.3d 267 (2005).

In this case, this Court should reverse, because the trial court erred in admitting improper opinion testimony. Further, counsel's unprofessional failures regarding this evidence was ineffective assistance.

a. Relevant facts

Before trial, the parties discussed the transcript of the interrogation of Mr. Marshall, which the prosecution intended to read into evidence. RP 63. Counsel objected to several portions of the transcript, including portions of the transcript on pages 17-19 and page 25, stating that the officers had repeatedly made comments which amounted to improper opinion evidence of Marshall's veracity or guilt. RP 66. On page 25, counsel pointed out, the detective "flat out" expressed his opinion. RP 66.

The court said it thought the case law was "clear" that the officer could not give such testimony at trial but that the cases "are a little bit split on" whether it was inadmissible under these circumstances, when the

evidence came in as part of a recorded interrogation. RP 66. The prosecutor then argued that courts had held that "statements made during the pretrial interview" were not the kind that carried a "special aura of reliability" and thus the evidence was permissible. RP 67.

The section on page 25 was Detective Graham confronting Marshall and declaring that, "when we left off I told you that I don't - neither one of us thinks that you were being totally honest with us in the first go around." Ex. 23 at 25.

Pages 17-19 of the transcript contained a monologue by Graham in which he said that officers knew that "there was some more things that went on that day," that they "actually do know" what happened, that he was not hard to identify from his accent, and that he should tell them his version of events. Ex. 23 at 17-18. Detective Graham then went on:

> And if you tell us that all you did was stay out out here on the street and you didn't go and talk to anybody, you didn't go into any building, and then later on we can prove, **and we will prove, that that's not true,** then you're gonna come out looking like a real bad guy. And you mighta had a good reason for going in and it **might have been a - an innocent reason** for going in. But when you stand up and you give that reason, and you talk to a lawyer and the lawyer says, "Hey, you gotta tell 'em what really happened, and that y - nothing bad went on," or the other person was okay or, or s- whatever it was, you're gonna say that. . . but the problem is that he and I got to come in and go, "Yeah, but. . . we asked Kelvin that, and he said he didn't do any of that. **So is he lying then or is he lying now?**

Ex. 23 at 18. The officer also said, "I don't think you've been telling us the - the complete truth, have you?" Ex. 23 at 18-19. He also said that Marshall was clearly scared but "not being honest with us is not the way out of this thing" and again said, "you haven't been completely honest,

have you?" Ex. 23 at 73.

Counsel also objected to the statement on the top of page 61 of the transcript where Detective Miller responded to Marshall declining to say he had gone to the apartment with the intent to have sex with Church, saying, "this is your only opportunity to tell us the truth," that neither officer was going to "come and talk" to him again, that "[t]his is it right here." Ex. 23 at 61. Counsel said it indicated the officer's belief that he was not telling the truth on that crucial point. RP 77.

The prosecutor argued that much of the challenged evidence was not improper opinion but rather interrogation technique. RP 75. She agreed, however, on several removals, including one on page 54 where counsel objected to Miller telling Marshall, "I appreciate that you told us for the most part, I think you have told us the truth." RP 75. The prosecutor conceded that, looking at the context, the statement on page 54 should be struck. RP 76.

For the language on page 61, the court said simply, "that section can stay in." RP 77. The judge also said, "[T]he Court will excise on Page 17, 18 and 19. . . and then leave in that section on Page 25." RP 68. The judge also apparently marked page 17 and "all of 18 and 19, down to the agreed portion on the bottom." RP 68.

Later, however, when the parties talked about what the court had ruled, they disagreed. RP 98. Counsel recalled the court's ruling as excluding the language on page 18 such as "we will prove that that's not true" and the comment about "is he lying now, or is he lying then." RP 98. Counsel again argued that the evidence was improper because it conveyed

the officer's opinion that Marshall was lying. RP 98. The prosecutor apparently thought that the ruling was that the evidence was admitted. RP 98-101. The court said it had already ruled and not excluded those portions. RP 100-101.

The transcript read at trial still contained the officer's declaration to Marshall of the officer's belief that Marshall had "told us the truth" for "the most part." Ex. 23 at 54. It also contained the entire monologue on pages 17-19, including the parts to which counsel had objected, as well as the declaration on page 61.

b. The improper evidence compels reversal, as does counsel's ineffectiveness

The trial court erred and abused its discretion in admitting this improper, prejudicial evidence of the officers' opinions. In State v. Demery, 144 Wn.2d 753, 758-59, 30 P.3d 1278 (2001), a deeply divided Court addressed the question squarely presented here. In that case, at trial, an audiotape of a pretrial interrogation of the defendant was played for the jurors, who were also given a transcript. 144 Wn.2d at 757. During the interrogation, the officer told the defendant he needed to "start tellin' the truth," asked if the defendant was "sure this is the story you wanna stick with," told him he was "lookin' at" multiple charges and, when the defendant said the officers were looking at him and talking to him like he was lying, the officer responded, "[c]ause you are." 144 Wn.2d at 757. The defendant had asked to have those portions of the transcript redacted, as Marshall did here, but the trial court had declined. 144 Wn.2d at 757-58.

On appeal, this Court had agreed that the officers' statements constituted impermissible opinion testimony about the defendant's veracity and that the error was not harmless. Id. On review from this Court's decision, four of the justices of the Supreme Court would have held that there was no improper opinion testimony. 144 Wn.2d at 758. While recognizing that "no witness may offer testimony in the form of an opinion regarding the guilt or veracity of the defendant" because of its unfair prejudice to the accused, those four justices would have affirmed on the grounds that the evidence admitted did not constitute improper "opinion" testimony. Id. Those justices believed that the evidence was not "testimony," because it was not from the officers themselves on the stand. 144 Wn.2d at 759-60. Further, they would have held that the officers' statements were not "improper opinion," because the officers had specifically testified at trial that accusing a defendant of not telling the truth was a commonly used interrogation tactic. Id. The four justices were also persuaded by the idea that, when a law enforcement officer gives testimony, that can have great sway with the jury but that statements made during a taped interview, not under oath, would not likely be given "special credibility" with the jury. 144 Wn.2d at 763.

But the view of those justices did not prevail. Instead, one justice agreed with those four only in the result, deeming the error "harmless" under a nonconstitutional standard because the parties had not argued that a constitutional standard should apply. 144 Wn.2d at 765 (Alexander, C.J., concurring).

The view which prevailed on this issue was that of the four

dissenting justices, with whom the concurring justice agreed. Id. Those justices were unconvinced that there was any distinction between playing a tape of an officer declaring that a suspect was lying in a pretrial interrogation or having testimony from the officer about the same topic, because "[t]he end result is the same: The jury hears the officer's opinion." 144 Wn.2d at 767 (Sanders, J., dissenting). Further, the justices noted, caselaw had established that testimony was not "the only form of evidence forbidden" under the prohibition against improper opinion evidence. Id. In a previous case, the Supreme Court had held that the fact that an arrest or citation had been issued "as to the respondent's negligence" was improper opinion, "whether it be offered from the witness stand or implied from the traffic citation which he issued[.]" 144 Wn.2d at 770 (quoting, Warren v. Hart, 71 Wn.2d 512, 514, 429 P.2d 873 (1967)).

Put simply, the justices said,

> We focus[] on whether the evidence was a comment on facts to be determined by the jury. It doesn't matter if the opinion is given directly during testimony in open court or if it is implied in some other way (like issuing a traffic citation).

Demery, 144 Wn.2d at 770-71. The justices concluded:

> There is no meaningful difference between permitting a jury to hear an officer directly call a defendant a liar in open court and permitting the jury to hear an officer call a defendant a liar on a tape recording. If we quite clearly forbid the former there is no reason to tolerate the latter. The drafters of the Washington rules of evidence intentionally crafted a rule which does not permit impeachment by opinion because they understood such evidence is too prejudicial. Neither the rule nor our case law limiting this prohibition applies to only testimony in open court.

144 Wn.2d at 772. And the concurring justice agreed, "the officer's accusation was opinion evidence regarding Demery's veracity that would

not have been admissible" in live testimony and should not have been "admitted in recorded form." 144 Wn.2d at 765 (Alexander, C.J., concurring).

Thus, the holding of Demery is that an officer's accusations that the defendant is lying, made during a recorded interrogation, **cannot** be played for the jury, because they are improper opinion evidence. State v. Jones, 117 Wn. App. 89, 90, 68 P.3d 1153 (2003). And this Court has so noted. Id.

In Jones, the defendant argued on appeal that the prosecutor committed misconduct when he elicited testimony that an officer did not believe him. 117 Wn. App. at 90-91. Jones was accused of unlawful possession of a firearm. 117 Wn. App. at 89. He had been seen by officer making "furtive movements" in a stopped car, after which a gun and holster had been found under the seat in which Jones had been sitting. 117 Wn. App. at 89. At trial, the prosecutor had elicited testimony from an interrogating officer that, during the interrogation of Jones, the officer had "addressed the issue" with Jones "that, you know, I just didn't believe him" when he claimed that he did not know about the gun or ever possessing it. Id.

On appeal, the prosecution conceded that it is not proper for a witness to testify about the credibility of another witness, but argued that the officer's testimony was not a comment on Jones' credibility. 117 Wn. App. at 91. Instead, the prosecution claimed, the officer "simply explained his 'interrogation technique' to the jury." Id. This Court, however,

disagreed, noting that a similar argument had been rejected by the four justices and the concurrence in Demery. 117 Wn. App. at 91-92. This Court then declared, "clothing the opinion in the garb of an interviewing technique does not help. As five of the justices determined in Demery, an officer's accusation that a defendant is lying constitutes inadmissible opinion evidence." Jones, 117 Wn. App. at 91-92 (emphasis added).

Even applying the extremely high standard for misconduct to which counsel failed to object, this Court concluded that reversal was required. "The only issue in the case was whether Jones constructively possessed the gun," noted this Court, which "came down to whether Jones knew the gun was under his seat." Id. The officer's improper opinion went directly to that issue, so that "an instruction would not have cured the harm" and reversal and remand for a new trial was required. Id.

Here, the evidence was admitted not through the playing of a tape as in Demery or through the officer's testimony on the stand as in Jones, but rather through the strange hybrid of having the Detective Miller, the prosecutor and another prosecutor reading the transcript into the record. See RP 365. And unlike in Jones, the evidence was admitted here not through the misconduct of the prosecutor but with the trial court's approval, based on the mistaken belief that an officer's statements on an interrogation tape could be excluded as merely explaining "interrogation techniques." See RP 66.

Reversal is required. Impermissible opinion testimony is reversible error because it "violates the defendant's rights to a jury trial," a constitutional right. State v. Kirkman, 159 Wn.2d 918, 927, 155 P.3d 125

(2007). As a result, the prosecution bears the burden of proving the admission of the evidence harmless, beyond a reasonable doubt. See State v. Guloy, 104 Wn.2d 412, 426, 705 P.2d 1182 (1985), cert denied, 475 U.S. 1020 (1986).

The prosecution cannot meet that heavy burden here. Constitutional error such as that which occurred here is presumed prejudicial, and reversal is required unless the prosecution can show that the overwhelming untainted evidence was so strong that *every* rational trier of fact would "necessarily" have found the defendant guilty, absent the error. Guloy, 104 Wn.2d at 426. Further, in deciding if the prosecution has met that high standard, this Court must assume that the damaging potential of the improperly admitted evidence was "fully realized." See State v. Moses, 109 Wn. App. 718, 732, 119 P.3d 906 (2005), review denied, 157 Wn.2d 1006 (2006).

It is worth a reminder that this standard is far, far different than the standard this Court applies when a defendant challenges the sufficiency of the evidence. In a sufficiency case, the Court looks at the evidence taken in the light most favorable to the state, drawing all reasonable inference therefrom. See State v. Thompson, 69 Wn. App. 436, 848 P.2d 1317 (1993). Further, the questions before the Court in such cases is whether *any* reasonable trier of fact *could have* found the defendant guilty. See State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). As a result, the question is whether the state produced the very minimum quantum of evidence required for *any* jury, to uphold a conviction, even if the vast majority of reasonable fact-finders would not have convicted.

With the "overwhelming untainted evidence" test, however, the question is whether the state produced so much evidence to prove the defendant's guilt that this Court can be convinced beyond a reasonable doubt that *every single, conceivable* jury would have convicted, faced with the untainted evidence. See State v. Evans, 96 Wn.2d 1, 7, 633 P.3d 83 (1981).

Here, the prosecution cannot meet its heavy burden of proving the constitutional error harmless. Repeatedly and over Marshall's objection, the jury heard evidence that both officers did not believe Marshall's versions of events, thought he was not telling the truth, and were convinced that he had entered with the intent to commit a crime despite his denials. Not only did the jury repeatedly hear the officers' opinions that Marshall was not telling the truth in his claims, they heard the officer's belief that they *had evidence to prove his guilt* and would do so. Ex. 23 at 18. And the jury further heard the officers' opinions that Marshall's claims that he did not intend to commit a crime when he entered were not the truth - the crucial question in the case. Ex. 23 at 17-19, 54, 61. The prosecution cannot meet its heavy burden of proving this constitutional error harmless beyond a reasonable doubt. This Court should so hold and should reverse.

Counsel's ineffectiveness on this issue would also compel reversal, even standing alone. Both the state and federal constitutions guarantee the right to effective assistance of counsel. Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); State v. Hendrickson, 129 Wn.2d 61, 77-78, 917 P.2d 563 (1996), overruled in part and on other

grounds by, Carey v. Musladin, 549 U.S. 70, 127 S. Ct. 649, 166 L. Ed. 2d 482 (2006); Sixth Amend.; Art. 1, § 22. To show ineffective assistance, a defendant must show both that counsel's representation was deficient and that the deficiency caused prejudice. See State v. Bowerman, 115 Wn.2d 794, 808, 802 P.2d 116 (1990). The "strong presumption" that counsel's representation was effective is overcome where counsel's conduct fell below an objective standard of reasonableness and prejudiced the defendant. See State v. Studd, 137 Wn.2d 533, 551, 973 P.2d 1049 (1999).

Here, Marshall can easily show counsel was ineffective. Counsel first properly moved to have Detective Miller's monologue on pages 17-19 and Detective Miller's declaration to Marshall that he thought Marshall had told the truth only "for the most part" excluded. RP 75. And he won. Not only did the court agree to exclude pages 17-19, the prosecutor agreed to exclude the "for the most part" comment as improper. RP 75-76.

Yet counsel's unprofessional failures essentially ensured that the prejudicial evidence he had fought to exclude would be admitted, even though he had won its exclusion. The "for the most part" comment was *not* deleted, apparently through the prosecutor's error. Indeed, the prosecutor herself noted another error in failing to delete a portion. RP 76. But even though he indicated he had reviewed the transcript, counsel failed to note that the offending opinion evidence had not been removed.

Further, when the disagreement came up about pages 17-19, counsel failed to ask to have the pages of the court's ruling transcribed, to determine whether his impression that he had won on that issue was

correct. Had counsel taken this minimal step, he would have ensured the court's initial ruling was honored in his client's favor. Because of counsel's unprofessional failures, the court's mistaken belief on that ruling that stood, and the jury erroneously heard that prejudicial opinion evidence.

Counsel was ineffective in these failures. Any reasonably competent attorney would have noticed the error in reviewing the transcript. And any reasonably competent attorney, when faced with the potential admission of highly prejudicial opinion evidence, would have taken the basic step of getting the court report to transcribe the very few pages in question.

Counsel's performance not only fell below an objective standard of reasonableness, it also prejudiced his client, allowing the jury to hear the officers' improper opinions. But even in the unlikely event that the Court does not agree that this ineffectiveness, standing alone, would compel reversal, reversal is already required based on the introduction of the improper opinion evidence. On remand, new counsel should be appointed.

2. THE PROSECUTOR COMMITTED FLAGRANT, PREJUDICIAL MISCONDUCT AND COUNSEL WAS AGAIN INEFFECTIVE

As "quasi-judicial" officers, prosecutors enjoy special status but also have special duties such as the duty to ensure that the defendant receives a fair trial. Berger v. United States, 295 U.S. 78, 88, 55 S. Ct. 629, 79 L. Ed. 2d 1314 (1935), overruled in part and on other grounds by, Stirone v. United States, 361 U.S. 212, 80 S. Ct. 270, 4 L. Ed. 2d 252 (1960); State v. Suarez-Bravo, 72 Wn. App. 359, 367, 864 P.2d 426

(1994). Further, a prosecutor must refrain from engaging in tactics the purpose of which is to "win" a conviction at all costs. See State v. Rivers, 96 Wn. App. 672, 675, 981 P.2d 16 (1999). It is the prosecutor's duty to seek justice, which requires seeking a conviction based solely on the evidence, rather than improper grounds. See State v. Monday, 171 Wn.2d 667, 677, 257 P.3d 551 (2011).

In this case, the prosecutor failed in those duties and committed serious, flagrant, prejudicial misconduct. Further, counsel was again ineffective.

a. Relevant facts

In closing argument, the prosecutor asked the jurors if they thought Church "was lying about that CD" and not knowing about it. RP 446-47. A moment later, the prosecutor declared, Church was "not lying about that CD." RP 446-47.

In his closing argument, defense counsel said that the jury need not find that Church or Marshall were lying:

> The reality of what happened in that apartment that day might be somewhere in between what Mr. Marshall said and what Ms. Church said, and that doesn't necessarily mean anybody is lying. You show two people the same event and they will interpret it differently. They will remember it differently. They see things differently.

RP 463. In rebuttal closing argument, the prosecutor then declared.

> [Counsel] suggested that, well, it's not necessarily that Tasha or the Defendant is lying, maybe it's a misinterpretation of events. **No, one of them is lying. And the question you need to answer is which one. Is it the innocent victim . . . or is it the Defendant[?]**

RP 479-80 (emphasis added).

b. The prosecutor's arguments were flagrant, prejudicial misconduct

The arguments of the prosecutor telling the jurors they were required to figure out who was lying in order to decide the case were flagrant, ill-intentioned and prejudicial misconduct which compel reversal. It is well-settled that it is "misleading and unfair" to make it appear that the jury must decide that the prosecution's witnesses are lying in order to fail to convict. State v. Casteneda-Perez, 61 Wn. App. 354, 362-63, 801 P.2d 74, review denied, 118 Wn.2d 1007 (1991).

Indeed, this type of "false choice" argument has been roundly condemned by our courts as misstating the law, the state's burden of proof and the jurors' true role. State v. Barrow, 60 Wn. App. 869, 809 P.2d 209, review denied, 118 Wn.2d 1007 (1991). It is not the jury's function, role or duty to decide who is telling the truth. See State v. Anderson, 153 Wn. App. 417, 220 P.3d 1273 (2009), review denied, 170 Wn.2d 1002 (2010). Instead, as this Court has noted, it is the jury's duty "to determine whether the State has proved its allegations against the defendant beyond a reasonable doubt," not to figure out who is lying. 153 Wn. App. at 429.

The choice presented by the argument is "false" because it improperly tells the jurors that either the state's witnesses or defense witnesses are lying and there are no other options. Barrow, 60 Wn. App. at 876. But this is untrue, even if the various versions of events conflict. Id. Instead,

> [t]he testimony of a witness can be unconvincing or wholly or partially incorrect for a number of reasons without any deliberate misrepresentation being involved. The testimony of two witnesses can be in some conflict, even though both

are endeavoring in good faith to tell the truth.

Casteneda-Perez, 61 Wn. App. at 362-63; see also, State v. Wright, 76 Wn. App. 811, 826, 888 P.2d 1214, review denied, 127 Wn.2d 1010 (1995).

Thus, in State v. Fleming, 83 Wn. App. 209, 921 P.2d 1076 (1996), the Court found the prosecutor's "false choice" argument misconduct, even though the victim and defendants had fundamentally opposed versions of events. 83 Wn. App. at 213. The defendants had been accused of raping the victim but claimed the sex was consensual. 83 Wn. App. at 213. In closing argument, the prosecutor told the jury it would have to find that the victim lied, was confused or just "fantasized" what she claimed had happened in order to find that the defendants had not committed the crime as she had said. 83 Wn. App. at 213. On appeal, the Court found this argument serious misconduct, because the jury was not required to find that the victim was lying in order to fail to convict the defendant - "it was *required* to convict *unless* if had an abiding conviction in the truth of her testimony." 83 Wn. App. at 213 (emphasis in original).

Indeed, the Fleming Court said, the jury could be unsure she was telling the truth, *or* question her ability to recall, or have some other question about the state's case and thus be required to acquit, even though none of those choices would require jurors to find that the witness was "lying." Id.

Further, telling the jurors they have to decide who is telling the truth in order to decide the case improperly dilutes the prosecution's constitutionally-mandated burden of proof. When a jury is tasked with

deciding which party is telling a truth, that invites them to decide the case based not upon whether the prosecution met its burden of proof but rather by "picking a side." See, e.g., United States v. Pine, 609 F.2d 106, 108 (3rd Cir. 1979). And these arguments, focusing on "determining whose version of events is more likely true" instead of whether the state has met its burden misleads jurors into basing their decision on a *balancing* of the weight of the evidence and deciding which is more likely, thus applying a preponderance of the evidence standard rather than the much higher, proper burden of proof. See United States v. Gonzalez-Balderas, 11 F.3d 1218, 1223 (5th Cir.), cert. denied, 511 U.S. 1129 (1994).

Reversal is required for this flagrant, prejudicial and ill-intentioned misconduct. Our courts condemned this very same argument *more than 20 years ago.* In fact, in Fleming, the Court found the arguments flagrant and ill-intentioned because the prohibition on "false choice" arguments had been announced just a few years before. 83 Wn. App. at 213.

Indeed, in Anderson, one judge of this Court expressed her deep concern that "[m]ore than two decades have passed since Casteneda-Perez" but prosecutors were making "false choice" arguments again - something she found "disheartening," especially because the prosecution was declaring such arguments "proper" despite the clear holding of cases such as Fleming. Anderson, 153 Wn. App. at 420-21 (Quinn-Brintnall, J., concurring). Further, the argument was of the type which was so prejudicial it could not have been cured, because it essentially invoked the normal decision-making people do every day. The jury's duty was far more serious and the prosecution's burden far more weighty than just

deciding which of the two "sides" it thought more likely. See Anderson, 153 Wn. App. at 416-17. It is highly unlikely a curative instruction could have cured the flagrant, ill-intentioned and prejudicial misconduct in this case.

In the alternative, even if this Court were to find that the misconduct could possibly have been cured by instruction, counsel was again ineffective. The decision to object to the first comment the prosecutor made could be seen as tactical, in order to avoid emphasizing the improper suggestion to the jurors. But there could be no legitimate tactical reason to fail to object and attempt to minimize the damage done to his client's rights once the prosecutor engaged in her "correction" of counsel's mitigating argument that someone could have been "mistaken." The prosecutor's flagrant, ill-intentioned and prejudicial misconduct compels reversal, and this Court should so hold. In the alternative, this Court should reverse based on counsel's ineffectiveness.

3. THE SENTENCING COURT ERRED IN ORDERING CONDITIONS OF COMMUNITY CUSTODY WHICH VIOLATED DUE PROCESS OR WERE NOT STATUTORILY AUTHORIZED

In addition to the other serious errors below, the sentencing court further erred in imposing several of the conditions of community placement/custody, because those conditions either were in violation of Marshall's First Amendment rights and his state and federal constitutional rights to due process or were not statutorily authorized.

Under the Sentencing Reform Act (SRA), the sentencing court is limited in its authority to order conditions of community custody. See,

e.g., State v. Kolesnik, 146 Wn. App. 790, 806, 192 P.3d 937 (2008), review denied, 165 Wn.2d 1050 (2009). Because the trial court does not have inherent authority to craft such conditions, any conditions it orders must be authorized by statute. See In re Carle, 93 Wn.2d 31, 33, 604 P.2d 1293 (1980). Further, conditions of community custody will violate due process if they are unconstitutionally vague. See State v. Bahl, 164 Wn.2d 739, 744-46, 193 P.3d 678 (2008).

As a threshold matter, these issues are properly before the Court. Where the lower court imposes an illegal or erroneous condition, that issue may be raised for the first time on appeal. Bahl, 164 Wn.2d at 744-46. Further, a challenge to such a condition may be made "preenforcement" if the challenge raises primarily a legal question and no further factual development is required. Id. Conditions 13 and 21 in this case meet those standards because they are both illegal or erroneous and raise primarily legal questions ready for this Court's review.

On review, this Court should find that the trial court erred in imposing those conditions. In general, a sentencing condition is reviewed for abuse of discretion. See, State v. C.D.C., 145 Wn. App. 621, 625, 186 P.3d 1166 (2008). By definition, however, a sentencing court abuses its discretion when it exceeds its sentencing authority. Id. As a result, a court will find abuse of discretion where the sentencing court has imposed a condition which is not statutorily authorized. See State v. Riley, 121 Wn.2d 22, 37, 846 P.2d 1365 (1993).

Further, the question of whether the court had statutory authority to impose a particular condition is reviewed de novo by this Court. See State

v. Armendariz, 160 Wn.2d 106, 110, 156 P.3d 201 (2007).

The relevant statute, RCW 9.94A.703 provides three types of conditions: mandatory, which the court must impose; "waiveable," which are imposed by default unless waived by the court; and "discretionary," which the court may order, if it so chooses. RCW 9.94A.703(1), (2) and (3). None of the challenged conditions in this case were authorized under any of those sections of the statute.

Taking condition 13 first, that condition prohibited Marshall from possessing or consuming controlled substances without a valid prescription from a "licensed physician." CP 218-19. RCW 9.94A.703(2) provides a "waiveable" condition of community custody that the offender to refrain from possessing or consuming controlled substances except pursuant to lawfully issued prescriptions. But nothing in the statute authorized the court to limit the relevant medical personnel from whom the defendant is allowed to actually get such a prescription.

Indeed, physicians are only one of the types of professionals with legal authority to write prescriptions in this state. See RCW 69.41.030(1). The Legislature has also chosen to give such authority to osteopaths, optometrists, dentists, podiatrists and certain physician assistants and nurse practitioners. See RCW 69.41.030(1). And the Legislature was clearly aware of its own statutory scheme regarding who could issue a "lawful prescription" when it wrote the condition in RCW 9.94A.703(2) to require such a prescription before an offender can consume or possess a controlled substance. See, e.g., Wynn v. Earin,163 Wn.2d 361, 372, 181 P.3d 806 (2008) (Legislature presumed to be aware of its own laws).

Nevertheless, the Legislature chose not to limit "lawful prescriptions" to those written only by a physician, instead just requiring that the prescription must be "lawful." RCW 9.94A.703(2). The trial court did not have the authority to override that Legislative decision by limiting the professionals from whom Marshall could get a "lawful prescription."

Like condition 13, condition 21 was also not statutorily authorized. Further, it runs afoul of both Marshall's due process and First Amendment rights. Our Supreme Court has held that any limitations on fundamental rights must be "reasonably necessary to accomplish the essential needs of the state." See Bahl, supra.

Condition 21 provided:

> Do not possess or peruse any sexually explicit materials in any medium. Your sexual deviancy treatment provider will define sexually explicit material. Do not patronize prostitutes or establishments that promote the commercialization of sex.

CP 218-19.

There is nothing in the record indicating that this case involved, in any way, prostitution, adult "toy" shops, or any of the frankly thousands of places which might fall under the rubric of this condition. The case involved an incident which occurred inside a private apartment, not in a sex shop, a prostitute or anything similar. While prohibiting future crimes such as prostitution is permissible, limiting a defendant's rights to access to lawful, adult materials or public places is improper when there is no evidence such materials had any part in the crime.

Further, the prohibition is unconstitutionally vague, as it fails to

provide ascertainable standards for enforcement and fails to provide sufficient notice of what is prohibited. Bahl, supra, is instructive. In that case, the Court addressed, *inter alia*, a condition prohibiting the defendant from frequenting "establishments whose primary business pertains to sexually explicit or erotic material." 164 Wn.2d at 752. The condition was not unconstitutionally vague, the Court held, because definitions of what was sexually explicit or erotic were relatively clear and thus identified the prohibition sufficiently. Id.

In contrast, here, there is no definition of what places exactly, promote the "commercialization of sex" and thus are prohibited for Marshall. And definitions vary. For example, some define the "commercialization of sex" as occurring whenever there is an "offering or receiving any form of sexual conduct in exchange for money." See, e.g., Christopher R. Murray, "Grappling with 'Solicitation": The Need for Statutory Reform in North Carolina after Lawrence v. Texas," 14 DUKE J. GENDER L. & POLICY 681, 682 (2007). Another may define "[t]he commercialization of sex" as including "all forms of media, including movies, television shows, songs, advertising, and magazines," used "to sell products and attract consumer interest" - thus potentially prohibiting Marshall from a much wider range of places. See Takiyah Rayshawn McClain, "An Ounce of Prevention: Improving the Preventative Measures of the Trafficking Victims Protection Act, 40 VAND. J. TRANSN'L L. 597, 603 (2007).

In addition, the First Amendment protects much which is sexually explicit, as well as covering communications, speech, etc. and even the

forum aspect of the Internet. See, e.g., Bahl, 164 Wn.2d at 757; see also, Reno v. ACLU, 521 U.S. 844, 117 S. Ct. 2329, 138 L. Ed 2d 874 (1997). Where a condition of community custody affects materials or conduct protected by the First Amendment, a "stricter standard" applies, requiring the government to show that the restriction in question is "reasonably necessary to accomplish the essential needs of the state and public order." Bahl, 164 Wn.2d at 757. That standard was not met by condition 21, especially because there is no evidence that sexually explicit materials or establishments "that promote the commercialization of sex" had anything to do with the crime.

This Court should strike the improper conditions, 13 and 21, as they were not statutorily authorized and were in violation of Marshall's due process rights to notice and his First Amendment rights to adult material.

4. THE SENTENCING COURT ACTED WITHOUT STATUTORY AUTHORITY AND IN VIOLATION OF RCW 9.92.110 IN ORDERING FORFEITURE

The sentencing court also acted outside its statutory authority in ordering that "[A]ll property is hereby forfeited. CP 215. Just as conditions of community custody, a sentencing court is limited in ordering other conditions of a sentence which are statutorily authorized. See, In re West, 154 Wn.2d 204, 110 P.3d 1122 (2005). Further, because the trial court acted outside its statutory authority, the issue may be raised for the first time on appeal. See Bahl, 164 Wn.2d at 745. Finally, the issue may be raised now because it is primarily a legal question and no further factual development is required, as the court's order requires that "all property" is

forfeited. Id.

The court acted without authority in ordering the forfeiture and the clause runs afoul of RCW 9.92.110. As this Court has held, the sentencing court has no "inherent authority to order the forfeiture of property" - even that used "in the commission of a crime." State v. Alaway, 64 Wn. App. 796, 828 P.2d 591, review denied, 119 Wn.2d 106 (1992). As a result, for there to be authority for forfeiture of property, there must be a statute providing authorization. Id. Further, the procedures set forth in the relevant statute must be followed in order for the forfeiture to be permitted. Id.

Division Three has also recently noted, "[t]he power to order forfeiture is purely statutory and will be denied absent compliance with proper forfeiture procedure." City of Walla Walla v. $401.333.44, 164 Wn. App. 236, 237-38, 262 P.3d 1239 (2011). Further, because "[f]orfeitures are not favored," they are enforced only when they are consistent with the "letter" and "spirit" of the law. Id.

Thus, in Alaway, when the state failed to commence a statutory forfeiture proceeding under any statute but argued on appeal that the trial court had inherent authority to order forfeiture of seized property under CrR 2.3(e), this Court disagreed. Alaway, 64 Wn. App. at 797. The property involved included "a substantial amount of equipment and personal property," such as photos and saws, which the state alleged was used in a marijuana "grow" operation for which Alaway was convicted. Id. After sentencing, the prosecution moved in court for an order forfeiting the property to the sheriff, but Alaway objected, asking for his

property back. Id. The prosecution argued to the trial court that the court had "inherent power to order how property used in criminal activity should be disposed of," although conceding that it had not followed the statutory requirements of the forfeiture statute it claimed applied. Id. The trial court agreed with that theory, and entered an order of forfeiture for most of the property. Alaway, 64 Wn. App. at 798.

On appeal, this Court rejected that idea. Id. Noting that it was possible the evidence was used in a grow operation and thus it might be "derivative contraband," the Court nevertheless found the forfeiture improper. A defendant is not automatically divested of his property interests in something which is not clearly contraband but rather used to create contraband simply because he is convicted of a crime, this Court said. Alaway, 64 Wn. App. at 799. Instead, "the State cannot confiscate" a citizen's property "merely because it is derivative contraband, but instead must forfeit it using proper forfeiture procedures." Id.

Further, this Court was clear that the theory that trial courts have "inherent authority" to order forfeiture was simply wrong. "Every jurisdiction that has considered the question has held that the power to order forfeiture is purely statutory," this Court said. 64 Wn. App. at 800. The Court also noted that "[s]cholarly authorities also establish that the United States has never had a common law of forfeiture, and that since colonial times, forfeiture in this country has existed only by virtue of statute." Id.

Put bluntly, this Court declared, "[i]n sum, there is **no authority**

anywhere for the State's contention that the court had the inherent power to order forfeiture of Alaway's property because he used it in his marijuana growing operation." Alaway, 64 Wn. App. at 801 (emphasis added). Because the authority was wholly statutory, this Court held, and because the prosecution failed to comply with the requirements of the relevant forfeiture statute, the forfeiture was improper and the defendant entitled to have his property returned. Id.

Thus, there can be no question that forfeiture proceedings must be pursued through the proper means of an authorizing statute, not simply ordered off-the-cuff as part of a criminal conviction. And indeed, to the extent that the court assumed it had authority to order the forfeiture based upon the criminal conviction here, that assumption runs directly afoul of RCW 9.92.110. That statute, which specifically abolished the doctrine of forfeiture by conviction, provides, in relevant part, "[a] conviction of [a] crime shall not work a forfeiture of any property, real or personal, or of any right or interest therein." RCW 9.92.110.

Thus, the mere fact that Mr. Marshall was convicted of a crime did not mean the court could simply dispose of any rights he had to any property, even if it was property the police seized as part of the evidence. Under Alaway, the prosecution first had to assert an actual statutory authority for an order of forfeiture. Further, the state was required to follow all the relevant provisions of whatever statute it thought might apply. See, e.g., RCW 10.105.010 (seizing agency - here, the police - must serve proper notice on all persons with a known right or interest in

the property, who then have a right to a hearing where they can attempt to establish an ownership right); RCW 69.50.505 (allowing forfeiture of controlled substances, raw materials for such substances, properties used as containers for them, and other conveyances and items used in drug crimes with proper notice, service and an opportunity for a hearing).

None of the relevant statutes or rules provides any authority for a sentencing court in a criminal case to order forfeiture of the property of a defendant in evidence, based solely upon his criminal conviction, without at least a modicum of proof that the specific property was somehow involved in or the fruits of criminal activity. Nor do they authorize such a forfeiture without any of the process which is constitutionally due before the government may seize the property of a man, or without following the requirements the Legislature set on such seizures.

The sentencing court did not have the authority to order forfeiture. This Court should so hold and should strike the improper order.

E. CONCLUSION

For the reasons stated herein, this Court should reverse. In the alternative, the Court should strike the sentencing court's improper orders.

DATED this 2nd day of October, 2013.

Respectfully submitted,

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CERTIFICATE OF SERVICE BY MAIL

Under penalty of perjury under the laws of the State of Washington, I hereby declare that I sent a true and correct copy of the attached Appellant's Opening Brief to opposing counsel and to appellant by depositing the same in the United States Mail, first class postage pre-paid, as follows: to Kit Proctor, 946 County City Building, 930 Tacoma Ave. S., Tacoma, WA. 98402; to Kelvin Marshall, DOC 363517, Coyote Ridge CC., P.O. Box 769, Connell, WA. 98326.

DATED this 2nd day of October, 2013.

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