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NO. 70443-5-I

THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION TWO

STATE OF WASHINGTON,

Respondent,

v.

JAMES FEY,

Appellant.

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

APPELLANT'S OPENING BRIEF

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A. INTRODUCTION.

When James Fey's 10-year-old daughter saw a school play about improper sexual touching, she told an actress that the play was funny and she could relate to it because her father did something similar to her. KR was immediately removed from her home; she told the police details of being touched in a way that was markedly similar to the script of the play performed at her school. At trial, KR gave minimal details of being touched one time. The defense agreed that the State could rely on KR's more detailed statement in the police-arranged interview, even though that interview was inadmissible under the rules barring hearsay.

Mr. Fey's jury trial is irreparably tainted by numerous evidentiary rulings made over Mr. Fey's objection that permitted the jury to base its verdict on inadmissible evidence. Additionally, his trial attorney's stipulation to otherwise inadmissible out-of-court allegations that formed the bulk of the evidence against Mr. Fey was so objectively unreasonable that it amounted to ineffective assistance of counsel. Finally, the court's sentencing order denying Mr. Fey contact with minors impermissibly violates his fundamental right to communicate with his own children.

B. ASSIGNMENTS OF ERROR.

1. The cumulative effect of numerous evidentiary errors denied Mr. Fey a fair trial.

2. The court misapplied the law by admitting hearsay statements made during court-mandated therapy sessions that were not uttered for the purpose of obtaining treatment or diagnosis.

3. The court improperly admitted prejudicial and non-probative evidence that the child complainant was placed in State-arranged custody after she alleged abuse by her stepfather.

4. The court impermissibly allowed a psychotherapist to offer medical reasons to bolster the child complainant's credibility.

5. The prosecution introduced evidence that exceeded the bounds of the fact-of-complaint doctrine.

6. The court erroneously permitted the State to attack the parenting skills of KR's mother and father based on irrelevant and unduly prejudicial allegations.

7. Mr. Fey was denied his right to effective assistance of counsel.

8. The court's imposition of conditions of lifetime community custody that prevent his ability to communicate with his family denies him fundamental rights without sufficiently compelling reasons.

C. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR.

1. The right to a fair trial includes the right to prevent the use of inadmissible hearsay and be free from unduly prejudicial allegations that lack sufficient probative value. The court overruled Mr. Fey's objections to testimony that violated the rules of evidence and admitted the complainant's hearsay accusations to a psychotherapist, the State's placement of the child complainant in a stranger's home as evidence it believed the truth of the accusations against Mr. Fey, out-of-court complaints about Mr. Fey, opinions on the complainant's credibility, and accusations of bad parenting choices by the complainant's parents. Did these numerous errors, considered cumulatively, undermine Mr. Fey's right to a fair trial by jury?

2. The right to effective assistance of counsel guarantees that an attorney understands the law and makes objectively reasonable strategic decisions. Mr. Fey's attorney stipulated to the admission of an otherwise inadmissible videotaped interview made by the complainant before trial. The entire interview was admitted for its truth and it

contained multiple allegations that were not otherwise admitted into evidence. The prosecution told the jury that it should pay close attention to the video and could base its verdict on evidence that only arose in the video. Was it unreasonable for counsel to stipulate to the admission of otherwise inadmissible allegations that likely served as the basis of the jury's verdict?

3. A parent's right to have a relationship with his children cannot be prohibited as a condition of sentencing without the court considering that restrictions are reasonably necessary to further a compelling state interest. The court entered several sentencing conditions denying Mr. Fey the ability to have contact with any minors, without recognizing that the conditions impacted the parent-child relationship. Is remand for resentencing required so the court can consider the deprivation of the parent-child relationship and weigh whether less restrictive alternatives should apply to Mr. Fey's children?

D. STATEMENT OF THE CASE.

One day at KR's school, adults performed a play involving the importance of telling other adults when a person has inappropriately touched them. 2RP 229-31. KR, who was in fourth grade, told an actress in the play how much she enjoyed it, asked if they would come

back and do another play because they were funny, and said her father did that to her. 2RP 197. The actress informed a school counselor who spoke to KR. 2RP 231-32; 3RP 274. KR told the counselor that she had been touched by her father. 3RP 275. Detective Michael Thomas then took KR to the hospital for a sexual assault examination and arranged an interview with KR and a forensic child interview specialist, Gina Coslett. 2RP 249; 3RP 296-97. This interview was videotaped. Ex. 33.

The State immediately removed KR from her home and put her in foster care. CP 59-60; 1RP 163, 176. KR did not return to her own home throughout the trial court proceedings. 1RP 176-77.

Prior to these allegations, KR had lived with her mother, Cynthia, stepfather James Fey, 17-year-old sister Ashley, and her six-year old twin sisters Hailey and Ember. 2RP 134-35. By all accounts, the family was close and loving. 2RP 147; 4RP 423-24, 475. Although Ashley and KR had a different biological father, they considered Mr. Fey their only father and he had raised them since they were young. 2RP 135; 4RP 465. The family enjoyed playing together, including wrestling, playing games, and watching movies. 4RP 425, 475-76.

At Mr. Fey's trial for one count of child molestation in the first degree, KR testified that one night while watching an action movie with

her father, he touched her vagina. 2RP 156. She did not recall how long it lasted or how his hand moved. 2RP158. She believed it happened other times but could not remember them. 2RP 155, 220. She also said that once, Mr. Fey took her hand and had him touch "his nuts" but she did not recall if it was over or under his clothes. 2RP 165. Mr. Fey testified that he never touched KR purposefully in any sexual manner and was hurt and confused by the allegations. 4RP 571-72, 603.

In the context of a dependency case filed against Mr. Fey and Cynthia, KR was court-ordered to attend weekly counseling sessions with Jo Jordan. 1RP 18; 3RP 328, 354-55. KR did not want to go to the sessions and was "very reluctant to talk." 3RP 337, 354-55. KR only spoke to Ms. Jordan one time about the incident of touching, and Ms. Jordan recounted that in detail at trial. 3RP 344-45, 352. Ms. Jordan said KR mostly talked about being lonely and missing her family. 3RP 362-63. Ms. Jordan diagnosed KR with a mental health condition that affected her memory and trustfulness, as well as "a lot of things" in her life. 3RP 342-43. Testimony about this condition and Ms. Jordan's repetition of KR's out-of-court statements was admitted at Mr. Fey's trial over his objection. 1RP 36-38.

Based on a stipulation with the defense, the prosecution introduced the entire videotape of the forensic interview between KR and Ms. Coslett. 2RP 46; 3RP 260. In this interview, KR alleged more incidents of and details about improper sexual touching with Mr. Fey than she mentioned at trial. KR said Mr. Fey forced her to touch his own sexual organ several times and described how it felt. Ex. 33 RP 27-31. She also described being touched on her own body several different times, which she not discuss at trial. Ex. 33 RP 11-13, 18-19, 22-23.

Mr. Fey was convicted after a jury trial and received a sentence of 59.5 months to life in prison. CP 25, 40. The court imposed community custody conditions that bar him from contacting minors or living in a house with them. CP 33. The court did not discuss how this condition would apply to Mr. Fey's own children.

Further pertinent details are discussed in the relevant argument sections below.

E. ARGUMENT.

1. **The complainant's out-of-court statements about the incident and her family life after the incident were inadmissible and so prejudicial that they denied Mr. Fey his right to a fair trial.**

a. *A court abuses its discretion and deprives an accused person of a fair trial by admitting unduly prejudicial, inadmissible hearsay.*

Hearsay is a statement made out-of-court and offered in evidence to prove the truth of the matter asserted. *State v. Redmond*, 150 Wn.2d 489, 495, 78 P.3d 1001 (2003); ER 801(c). It is inadmissible except for the specific exceptions contained in the rules of evidence or statute. Here, the State presented numerous statements made by the complainant out-of-court for their truth over defense objection. The court's rulings admitting such statements were based on a misunderstanding of the law, which constitutes an abuse of discretion. *State v. Ramirez-Estevez*, 164 Wn.App. 284, 289-90, 263 P.3d 1257 (2011).

The "constitutional floor" established by the Due Process Clause "clearly requires a fair trial in a fair tribunal" before an unbiased court. *Bracy v. Gramley*, 520 U.S. 899, 904-05, 117 S. Ct. 1793, 1797, 138 L. Ed. 2d 97 (1997); U.S. Const. amend. 14; Wash. Const. art. I, § 3, 21,

22. Erroneous evidentiary rulings violate due process by depriving the defendant of a fundamentally fair trial. *Estelle v. McGuire*, 502 U.S. 62, 75, 112 S.Ct. 475, 116 L.Ed.2d 385 (1991); *Dowling v. United States*, 493 U.S. 342, 352, 107 L. Ed. 2d 708, 110 S. Ct. 668 (1990) (improper evidentiary rulings deprive a defendant of due process where it is so unfair as to "violate[ ] fundamental conceptions of justice"). Numerous erroneous court rulings throughout the course of Mr. Fey's trial denied him his right to a fair trial, as detailed below.

b. *The child's statements during court-ordered counseling lacked reliability, relevance, and were inadmissible under the rules barring hearsay.*

i. *Statements to a doctor are admissible where their reliability is ensured due to the personal importance treatment involved*

Under ER 803(a)(4),[1] a patient's statements to a medical professional are admissible when made for the purpose of receiving treatment. *State v. Moses*, 129 Wn.App. 718, 729, 119 P.3d 906 (2005), *rev. denied*, 157 Wn.2d 1006 (2006). The statements must also be part of the medical professional's treatment needs. *State v. Butler*, 53

[1] ER 803(a)(4) defines admissible medical hearsay as:
[s]tatements made for purposes of medical diagnosis or treatment and describing medical history, or past or present symptoms, pain, or

Wn.App. 214, 217, 219-21, 766 P.2d 505 (1989). "The rationale is that we presume a medical patient has a strong motive to be truthful and accurate. This provides a significant guarantee of trustworthiness." *State v. Perez,* 137 Wn.App. 97, 106, 151 P.3d 249 (2007).

ER 803(a)(4) does not expressly include statements to mental health therapists although in some circumstances courts have extended the hearsay exception to mental health treatment. *In re Dependency of M.P.*, 76 Wn.App. 87, 92-93, 882 P.2d 1180 (1994). However, statements to a psychologist do not have the same inherent presumptive reliability as those to a medical doctor regarding a physical injury. *People v. LaLone*, 432 Mich. 103, 437 N.W.2d 611, 614 (1989). Lying or misrepresenting medical symptoms and their causes to a health care provider "would be detrimental to the patient" who presently needs treatment; in addition, physical symptoms can be corroborated through empirical tests. *Id.* at 613; *see also State v. Hinnant*, 351 N.C. 277, 523 S.E.2d 663, 668 (2000) ("declarant's health – even life – may depend on the accuracy of information supplied to the doctor" when medical diagnosis or treatment at issue, unlike psychological treatment). A

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sensations, or the inception or general character of the cause or external source thereof insofar as reasonably pertinent to diagnosis or treatment.

psychologist may use untrue statements as a basis for diagnosis, making truthfulness less important when speaking to a psychologist. *LaLone*, 437 N.W.2d at 613. In Mr. Fey's case, psychotherapist Jo Jordan said she would have met with and treated KR regardless of the truth of her accusations. 3RP 353.

The timing and nature of the counseling sessions may show whether they are made for the purpose of diagnosis and treatment as required by the hearsay rule. In *LaLone*, the Michigan Supreme Court ruled that a complainant's statements to a psychologist, made after the accusations were made to the police, "did not have the same measure of reliability" as would statements made during a regularly scheduled psychological therapy session. 437 N.W.2d at 615. If the entire story was fabricated, as the defense claimed in *LaLone*, "surely once the complainant had offered the story to the police, she would offer consistent statements to a psychologist." *Id.* The lack of incentive to give the psychologist a different story than the police undercut the presumption of reliability required for the medical hearsay exception. *Id.* Like *LaLone*, the defense asserted that KR fabricated the incident at the time of her initial accusation, and by the time she met with the

therapist, she had given formal statements to a police detective and forensic interviewer. 1RP 65; 2RP 249, 253; 3RP 296-97.

When "[t]here is nothing in the record that indicates the children understood that their statements would further diagnosis or treatment," a child's statements to a psychologist may lack "the indicia of reliability required for admission under ER 803(a)(4)." *State v. Lopez*, 95 Wn.App. 842, 849-50, 980 P.2d 224 (1999). Whether the physician explained the purpose of the examination to the child as the need for treatment and the importance of truthfulness may indicate whether the statements are sufficiently reliable as medical hearsay. *See Hinnant*, 523 S.E.2d at 670. KR was court-ordered to attend therapy sessions, was not told that she must tell the truth during the sessions, and believed the purpose of the meetings was to prepare her for court, not to receive treatment. 1RP 18; 2RP 178; 3RP 354-55.

In *Matta-Ballesteros*, the defendant "was ordered to see the prison psychologist and did not even believe that he had any reason to see the psychologist." *United States v. Matta-Ballesteros*, 71 F.3d 754, 767 (9th Cir. 1995), *opinion amended on denial of reh'g*, 98 F.3d 1100 (9th Cir. 1996). Because the counseling was both mandated and unwanted by the defendant, the court concluded that he "had no special

incentive to be truthful" and his statements to the psychologist were properly excluded under the medical hearsay exception in the equivalent federal rule of evidence. *Id.* (citing 4 J. Weinstein & M. Berger, *Weinstein's Evidence,* § 803(4) (1992)).[2]

In the context of statements to a psychologist, the circumstances of the interaction with the psychologist are critical to determining whether statements may fit within the medical hearsay exception of ER 803(a)(4). The proponent of the statement must satisfy the court "that the patient understood the need to speak truthfully and that the statements were reasonably necessary for the treatment or diagnosis of the patient." *Felix v. State*, 109 Nev. 151, 849 P.2d 220, 249 (1993) (internal citation omitted). "The trial court must, as with any evidence, assess the inherent reliability of the testimony, the relevance of the testimony, and undertake a balancing test, particularly of prejudice versus probativeness." *Id.* For example, when a child volunteers detailed information about an incident and gives "consistent, specific responses to [the therapist's] nonleading" questions, the circumstances may demonstrate the child's motive to give reliable statements about the

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[2] ER 803(a)(4) is the same as the federal rule. K. Tegland, 5D Wash. Prac., Handbook Wash. Evid., 5 n.3 § 803.1 (2013-14 ed.).

incident. *M.P.*, 76 Wn.App. at 94. KR's statements do not bear indicia of reliability as required by ER 803(a)(4).

ii. *KR's statements to during court-ordered psychotherapy contain no guarantees of trustworthiness and are inadmissible under ER 803(a)(4).*

The guarantee of trustworthiness that permits a court to admit medical hearsay for its truth does not apply in the case at bar. KR was court-ordered to attend weekly treatment sessions with a psychotherapist as part of a dependency action filed after she alleged abuse by Mr. Fey. 1RP 18; CP 59. It was not her choice to attend the sessions and she did not like going. 3RP 354-55. KR had already made her accusations, been interviewed in great detail by a forensic interview specialist, and been removed from her family home by the time she was ordered to meet with therapist Jo Jordan. 3RP 335-36.

KR did not have a motive to be truthful and did not speak to Ms. Jordan for the purpose of receiving treatment. Ms. Jordan told KR their conversations would not be private because her records were available to the court and she would tell others if KR discussed someone hurting her. 3RP 338. Ms. Jordan did not emphasize with KR that her statements need to be truthful, and Ms. Jordan admitted that she would

continue to meet with KR regardless of the truth of her accusations. 3RP 353.

KR believed the reason she was required to see Jordan as "to get me ready" for court. 2RP 178. She and Ms. Jordan "went over . . . what I was going to say" in court. 2RP 179.

Ms. Jordan conceded KR was "very reluctant" to talk to her about anything. 3RP 337. She spoke about missing her family and played games with Jordan. 3RP 337, 339. Six months of weekly sessions passed before KR even spoke to Ms. Jordan about the charged incident and this one-time limited explanation of the allegations was all that KR said. 3RP 344-45. The bulk of KR's statements to Ms. Jordan were about feeling lonely and missing her family. 3RP 339, 363. However, Ms. Jordan also testified about any statements KR made to her about the incident. 3RP 344-46, 349-52.

Over Mr. Fey's objection, the court admitted KR's statements to Jordan under ER 803(a)(4). 1RP 18-19. Mr. Fey argued that the counseling was court-ordered for the dependency proceeding and no case law admitted statements elicited during court-ordered psychotherapy under ER 803(a)(4). 1RP 18. The judge drew upon his own experience as an attorney, although he admitted he did not know if

he should consider his own experience, and opined that a lawyer would not send someone to treatment in order to gather information for court. 1RP 20. However, the judge's own experience did not apply to KR's understanding of the purposes of meeting with a psychologist.

The proponent seeking admission of admitting otherwise prohibited hearsay bears the burden of showing why the statements are admissible. 1A Wash. Prac., Methods of Practice § 29:6 (4th ed.); *see In re Dependency of Penelope B.*, 104 Wn.2d 643, 654, 709 P.2d 1185 (1985). The prosecution claimed that statements to a psychologist always qualify as statements reasonably pertinent to diagnosis or treatment without regard to the circumstances of the case. Supp. CP _, sub. no 38, p. 11. This overly broad interpretation of ER 803(a)(4) is not supported by the law or the plain terms of the rule, which is expressly confined to "medical diagnosis or treatment" and has been extended to mental health treatment only when there is evidence that such treatment was the motive of the declarant and the statements were elicited in a reliably fashion where the declarant acknowledged the importance of telling the truth. *See M.P.*, 76 Wn.App. at 92-93.

None of Ms. Jordan's testimony about what KR said to her should have been admitted because the circumstances do not

demonstrate they were reliably elicited for treatment purposes. KR did not seek this treatment and it is KR's purpose in making statements to Jordan that is the touchstone. The court-ordered sessions that KR was required to attend even though she did not want to participate do not meet the elements of ER 803(a)(4) and the court misapplied the law in permitting the State to elicit what KR told Ms. Jordan.

c. *The court improperly permitted extensive testimony about the State's placement of KR in another home after KR's allegations.*

Mr. Fey objected to evidence about legal proceedings that occurred after KR alleged inappropriate touching by her stepfather based on their lack of probative value and undue prejudicial effect. 1RP 64-65; ER 403. The State wanted to introduce the pending dependency proceeding and KR's foster care placement because "it goes to in some ways my theory of the case insofar as her credibility." 1RP 23. Its position was that because she was "taken away from her home, her family that she loves," after the allegations, the allegations appear more credible. 1RP 23-24. The State conceded that KR liked her foster placement but usually children do not want to be in foster care so her placement there is "woven into my theory." 1RP 24.

Defense counsel countered that KR's placement in foster care shed no light on the credibility of her allegations. 1RP 65, 70. She accused Mr. Fey of misconduct before she was placed in foster care and before she knew that she would be placed there. 1RP 65; 2RP 111-12. Her subsequent long-term foster care placement did not show whether she truthfully alleged sexual contact occurred before she was placed in foster care by the State. 1RP 65, 70.

Defense counsel argued that the prejudicial effect of the jury hearing that KR had been removed from her home by the State could not be cured. 1RP 64-65; 2RP 115. It would imply the State believed and a judge had found the parents not fit, thereby bolstering the claim that abuse occurred. 2RP 116-17, 121-124. The court allowed the evidence but directed the State to call it an "out of home placement" rather than a dependency proceeding or foster care. The judge feared that the jurors might infer Mr. Fey's guilt from the fact that the State removed the child from her home but suggested a limiting instruction as a way for the State to admit the evidence it sought. 2RP 118, 123-24. Mr. Fey again objected that the prejudicial effect outweighed any probative value and the prejudice could not be erased by the limiting

instruction; the court granted a standing objection on the admission of evidence about KR's placement. 2RP 121-24.

The prosecution elicited numerous statements from KR describing how she was "placed" outside her home and "taken away" from her sisters and mom. 2RP 163. The same day that she made her allegations to the police, she was brought to Kim Miller's house, who was a stranger to her, and she remained there throughout the trial proceedings. 2RP 176-77.

The prosecutor drew out KR's feelings about being placed in another home in repetitive detail. He asked her how it felt to live in another home, whether she missed her sisters, if she saw her sisters and her mother, whether she missed her mother. 2RP 176-77. KR described her loneliness and sadness at not seeing her family. *Id.* She repeatedly said she missed her family. 2RP143-44. The prosecutor asked if she was ever permitted to see her sisters, and KR said only if she bumped into them at school. 2RP 177. She also had not been allowed to see her mother other than in a counseling session that ended some time earlier. *Id.*

The court did not give a limiting instruction to the jury at the time the prosecutor elicited testimony about KR's out-of-home

placement and the difficulties it posed for her. It gave a written instruction to the jury as part of its final instructions:

> Certain evidence has been offered in this case only for a limited purpose. This evidence consists of testimony that KR is in an out of home placement and may be considered by you only for the limited purpose of assessing KR's credibility or lack thereof. You may not consider it for any other purpose. Any discussion of the evidence during you deliberations must be consistent with this limitation.

CP 49 (Instruction 6).

This instruction did not cure the unduly prejudicial effect of the inadmissible evidence detailing KR's placement in another home and its effect on her, as Mr. Fey anticipated. *See* ER 403. By telling the jury KR was in an "out of home placement" that could be considered for purposes of assessing KR's credibility, the jury could infer the State removed KR from her home due to the credibility of her allegations. 2RP 117, 124. A ten year-old girl would not be "placed" out of her home, to live with a stranger with only minimal contact with her own family, absent state intervention; calling it an out-of-home placement does not negate the jury's ability to infer the State's involvement in orchestrating the placement. Moreover, as Mr. Fey argued, the State's emphasis on KR's recent loneliness and isolation shed no light on the

credibility of KR's accusations because her allegations arose before KR was placed in foster care. 2RP 117, 119-20. But at the same time, KR's foster care placement engendered sympathy for KR and bolstered her credibility by implying the State removed her home because it believed in the truth of her allegations. 2RP 119-22. The limiting instruction permitted the jury to use the evidence for the improper purpose of bolstering KR's credibility. It did not cure the undue prejudice resulting from the jury hearing the heart-tugging evidence that KR was placed in another home and denied access to the family she loved because of the allegations she made. 2RP 121-22. Substantial evidence of KR's placement and isolation was far too prejudicial to outweigh its probative value.

d. *The court permitted "fact of complaint" witnesses to testify to specifics beyond the fact that a complaint was made.*

The fact of complaint doctrine permits the court to admit evidence about the *time* the complainant alleged a sexual offense occurred, but not further elaboration about the identity of the perpetrator or details of the nature of the accusation. *State v. Ferguson,* 100 Wn.2d 131, 135, 667 P.2d 68 (1983). It admits only evidence to establish that the complaint was timely made. *Id.* at 135–36. It does not

permit evidence of the details of the complaint, including the identity of the offender and the nature of the act. *Id.* at 136.

The prosecution agreed to adhere to this rule prior to trial, however, it elicited details about the allegations when questioning school counselor Laurie Schrieber and Virginia Connell, over Mr. Fey's objection. 1RP 28; 3RP 275, 280. The court overruled Mr. Fey's objection. 3RP 375. The State misused the fact of complaint doctrine to remind jurors that KR made consistent allegations against Mr. Fey as a way to bolster her credibility in closing argument, to make up for the inconsistencies in her trial testimony that the State was forced to acknowledge. 5RP 629, 657. Evidence about the details of the allegations, including the identity of the perpetrator was inadmissible and should not have been a basis for the jury to believe KR's claims. *Ferguson,* 100 Wn.2d at 135.

e. *The therapist's opinion that KR had memory problems due to a medical condition was inadmissible bolstering.*

No witness may comment, directly or indirectly, on the credibility of another witness. *State v. Kirkman*, 159 Wn.2d 918, 927, 155 P.3d 125 (2007). The right to a trial by jury "includes the independent

determination of the facts by the jury," untainted by opinions on guilt or veracity by other witnesses. *Id.*

The assessment of credibility is for the trier of fact alone. "A lay opinion is not 'helpful' within the meaning of ER 701, because the jury can assess credibility as well or better than the lay witness. An expert opinion will not "assist the trier of fact" within the meaning of ER 702, because there is no scientific basis for such an opinion." *State v. Carlson*, 80 Wn. App. 116, 123, 906 P.2d 999, 1002-03 (1995).

Under the guise of medical testimony, the prosecution sought to elicit testimony that psychotherapist Jordan diagnosed KR with post-traumatic stress disorder after the incident. Under the State's theory, this diagnosis explained KR's lack of memory and inability to explain the alleged events in detail. 1RP 35.

The defense objected, questioning the validity of the diagnosis, its relevance, and its undue prejudicial effect. 1RP 36-37. The court barred the State from offering the name of the diagnosis, but told the prosecution to refer to it as a mental health condition. 1RP 38.

Instead of calling it a mental health condition, the prosecution referred to Jordan's diagnosis as a "medical condition." 3RP 342. Jordan

said that KR had a condition that caused her problems with her memory, trust, and "lots of things." 3RP 343.

From the testimony about a "medical condition" that compromised KR's ability to give details about past events and hampered "lots of things" in KR's life, the prosecution used Ms. Jordan's testimony to argue that KR had a medical excuse explaining the failings of her testimony. 5RP 630.

In his closing argument, the prosecution told the jury that if KR was lying, she was "believable enough to fool everyone in this case for almost 10 months, including her mental health counselor" Jordan. 5RP 629. The prosecutor also claimed that Jordan testified that KR's statements to her about sexual abuse "are consistent with what she said in her forensic interview." 5RP 630. He further claimed that KR "is to be believed because expert witnesses were presented by the State." 5RP 631. KR's testimony that she did not remember details was "consistent with Ms. Jordan's testimony" about KR's medical condition. 5RP 631. The prosecution impermissibly used Ms. Jordan's purported belief in the truth of KR's allegations as vouching for KR's credibility while invoking a medical condition as an excuse for KR's failure to clearly describe the improprieties underlying the charges.

f. *The prosecution insisted Mr. Fey and his wife were guilty of bad parenting.*

Over Mr. Fey's objection, the prosecution asked argumentative questions to show the State's opinion that Mr. Fey and his wife had been bad parents.

The prosecutor elicited from Ms. Jordan a remark Mr. Fey's wife Cynthia made to KR during a family therapy session, where she said that "four innocent people" were suffering due to KR's allegation. After eliciting this remark from the therapist, the prosecutor repeated the statement to Cynthia and asked her, "That's quite a statement for a mother to make, isn't it?" 4RP 518. The court overruled the defense objection. 4RP 519. The prosecutor then asked, "You would agree that … maybe subtly, at the very worst, conveys a message to K[ ] that she's not loved, doesn't it?" 4RP 519. Defense counsel objected again and the court sustained the objection as speculation. *Id.* The prosecutor asked how KR reacted and then said, "Well, that's quite a thing to say to your child, isn't it?" 4RP 520. Mr. Fey objected and the court sustained the objection. *Id.*

In his closing argument, the prosecution told the jury that one reason they should find KR credible was, "how could K[R] know that

she would suffer the rebuke of her own mother in counseling, with a session in which the mother said there are four innocent people suffering in this family because of you." 5RP 634.

The prosecutor also questioned Mr. Fey's parenting skills for permitting his daughters to watch a PG-13 movie called Sucker Punch. Mr. Fey had not selected this movie; his daughter Ember picked it out at the movie store because it looked like an action movie featuring girls who fight, which appealed to them. 4RP 502, 579. As they watched it, they saw a few scenes of scantily clad girls. 4RP 448, 581.

The prosecutor's first question to Ashley, KR's older sister, was "So let's talk about Sucker Punch. . . . . Do you think that's an appropriate movie for KR to be watching?" 4RP 448. Mr. Fey objected as "completely irrelevant" but the court overruled the objection. *Id.* Ashley responded that it was probably "not entirely appropriate, but it's not extremely inappropriate." *Id.* The prosecutor followed by eliciting that the movie had scantily clad women, "a significant amount of violence," and sexually provocative dancing. 4RP 448-49. The prosecutor asked Ashley if she would have allowed KR to watch the movie, but the court sustained the defense objection. *Id.* In his closing

argument, the prosecution contended that Ashley agreed watching the movie Sucker Punch "was inappropriate." 5RP 659.

The prosecutor asked Mr. Fey, "What part of Sucker Punch is actually appropriate for kids, I mean, for a kid – for a child your twins' age and K[R]'s age?" 4RP 610. The court sustained Mr. Fey's objection. 4RP 611. The prosecutor repeatedly questioned Mr. Fey about why he had not told the detective about watching the movie Sucker Punch with KR. 4RP 607-08.

Mr. Fey's judgment in permitting his children to watch the movie Sucker Punch was irrelevant to the charged incident. He had not selected the movie, did not know its content in advance, and had not otherwise placed inappropriate movies before his children. Yet the prosecution spent significant time emphasizing the inappropriateness of this parenting choice. The prosecution further highlighted Cynthia's "rebuke" of her child, asking the argumentative question that it was "quite a thing" for a mother to make such a statement to her daughter. These tactics placed irrelevant and unduly prejudicial information before the jury and underscored the probability that the jury reached its verdict for improper reasons.

g. *The cumulative prejudice resulting from improperly admitted evidence denied Mr. Fey a fair trial.*

The cumulative effect of various errors, preserved and unpreserved, may deny an accused person a fair trial. *State v. Alexander*, 64 Wn.App. 147, 150-51, 822 P.2d 1250 (1992); *see State v. Coe,* 101 Wn.2d 772, 789, 684 P.2d 668 (1984). Under the cumulative error doctrine, even where one error viewed in isolation may not warrant reversal, the court must consider the effect of multiple errors and the resulting prejudice on an accused person. *United States v. Frederick*, 78 F.3d 1370, 1381 (9th Cir. 1996).

The prosecution improperly bolstered its case by using evidence with little or no probative value, and inadmissible hearsay, to engender undue sympathy for KR. The prosecution's closing argument heavily relied on the inadmissible evidence, particularly Ms. Jordan's testimony about what KR had told her, demonstrating its importance to the State's case. *See, e.g.*, 5RP 624, 627, 629, 630, 631, 657.

The prosecution improperly used a psychotherapist to repeat KR's out-of-court allegations and describe KR's loneliness and lack of support after she made her accusations. It emphasized that the allegations had resulted in KR's immediate removal from her home and

placement with a stranger, as well as her isolation from her sisters and mother. It attacked KR's mother for "rebuking" her in a therapy session by saying the rest of the family was suffering. It challenged KR's mother to admit she was a poor parent who conveyed to her child that she did not love her. It called Mr. Fey inappropriate for permitting his young children to watch a movie with scantily clad women. This array of information had either little or nothing to do with the veracity of the initial allegation, or was excluded by rules of hearsay, yet the prosecution highlighted this extraneous information to seek a verdict against Mr. Fey. Taken together, this improperly admitted evidence affected the outcome of the case. *Alexander*, 64 Wn.App. at 150-51.

2. **Defense counsel's unreasonable stipulation to the admission of otherwise inadmissible evidence alleging numerous uncharged offenses constitutes ineffective assistance of counsel**

    a. *The right to effective assistance of counsel includes a competent lawyer who makes reasonable tactical decisions.*

An attorney renders constitutionally inadequate representation when she engages in conduct for which there is no legitimate strategic or tactical reason. *State v. Grier*, 171 Wn.2d 17, 33-34, 246 P.3d 1260 (2011); U.S. Const. amend. VI; Const. art. I, § 22. Even if defense counsel

had a strategic or tactical reason for acting in a certain fashion, "[t]he relevant question is not whether counsel's choices were strategic, but whether they were reasonable." *Roe v. Flores–Ortega,* 528 U.S. 470, 481, 120 S.Ct. 1029, 145 L.Ed.2d 985 (2000); *see also Wiggins v. Smith*, 539 U.S. 510, 523, 123 S.Ct. 2527, 156 L.Ed.2d 471 (2003) ("[t]he proper measure of attorney performance remains simply reasonableness under prevailing professional norms," quoting *Strickland v. Washington,* 466 U.S. 668, 688, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984)).

"Reasonable conduct for an attorney includes carrying out the duty to research the relevant law." *State v. Kyllo*, 166 Wn.2d 856, 862, 868-69, 215 P.3d 177 (2009). For example, an attorney performs unreasonably by "failing to object to an instruction which incorrectly sets out the elements of the crime" that "permitted the defendant to be convicted of a crime he or she could not have committed under facts presented by the State." *State v. Aho*, 137 Wn.2d 736, 745-46, 975 P.2d 512 (1999) (citing *State v. Ermert,* 94 Wn.2d 839, 849-50, 621 P.2d 121 (1980)). Likewise, the defense attorney must understand the law when telling a client about whether the State can prove its case at trial. *Lafler v. Cooper*, _U.S. _, 132 S.Ct. 1376, 1384, 182 L.Ed.2d 398 (2012). "[T]here is no conceivable legitimate tactic where the only possible effect

of deficient performance was to allow the possibility of a conviction of a crime under a statute which did not exist and could not be applied during part of the charging period." *Aho*, 137 Wn.2d at 745-46

While an attorney's decisions are treated with deference, and his competence is presumed, his actions must be reasonable based on all circumstances. *Wiggins*, 123 S.Ct. at 2541; *State v. Tilton*, 149 Wn.2d 775, 785, 72 P.2d 735 (2003). To assess prejudice, the defense must demonstrate grounds to conclude a reasonable probability exists of a different outcome, but need not show the attorney's conduct altered the result of the case. *Tilton*, 149 Wn.2d at 784.

Before Mr. Fey's trial, defense counsel stipulated to the admission of the complainant's recorded interview with a forensic child interview specialist. 1RP 5-6; Supp. CP _, sub. no. 38, p. 7. Gina Coslett had interviewed KR at the request of the investigating detective, who also watched the interview from the next room and assisted Ms. Coslett in framing questions for KR. Ex. 33RP 3; 2RP 249. A social worker was also present during the interview. Ex. 33RP 21.

Defense counsel agreed to admit the entire recording in full prior to trial. 1RP 5-6. He did not seek any redactions or exclusions of portions of the videotape. Ex. 33.

KR's out-of-court statements to Ms. Coslett were hearsay, admitted for their truth, and no exception would permit their introduction if counsel had not stipulated before trial. *See State v. Sua*, 115 Wn.App. 29, 48-49, 60 P.3d 1234 (2003). An out-of-court statement by an in-court witness must be "given under oath subject to the penalty of perjury" to be admissible. *Id.* (citing ER 801(d)(1)(i)). It cannot be admitted as substantive evidence when not made under oath and subject to the penalty of perjury. *Id.*

The parties agreed before trial that the "child hearsay" statute, RCW 9A.44.120 would not allow admission of the interview, because KR was not under the age of ten when she was interviewed by Ms. Coslett and this statutory hearsay exception only applies when the child is less than 10 years old at the time of her statements. 1RP 5, 47; 2RP 128-30.

Also, the interview was not admissible as a statement made for purposes of medical diagnosis and treatment under ER 803(a)(4), because it was a police-arranged interview conducted for forensic and not treatment purposes. *See Lopez*, 95 Wn.App. at 850.

Even if the defense wanted to use parts of KR's interview to impeach her with inconsistent statements, evidence used for

impeachment purposes is not admitted as substantive evidence. "Impeachment evidence affects the witness's credibility but is not probative of the substantive facts encompassed by the evidence" and may not be used by the prosecution as substantive evidence. *State v. Clinkenbeard*, 130 Wn.App. 552, 569-70, 123 P.3d 872 (2005). Because the entire recorded interview was inadmissible for its truth, the jury would not have seen it absent defense counsel's pretrial stipulation to its admission.

Because the defense stipulated to the entire interview in advance of trial, the prosecution used KR's multiple allegations in the forensic interview to supply facts essential to the charged offense. 5RP 625-26, 629. The State invited the jury to base its verdict on an incident discussed in the interview even if it was not mentioned during live testimony. 5RP 636. It told the jury that it "hope[d] you'll consider very carefully the child forensic interview that K[R] did." 5RP 625.

In her trial testimony, KR gave only scant information about being touched by Mr. Fey in "inappropriate" ways and could only describe one incident. 2RP 152-53, 183. She said she was touched on her vagina but did not recall how or whether Mr. Fey's hand moved or how long it lasted. 2RP 158-59. KR agreed her description of events

went "better" when she spoke with Ms. Coslett than when testifying. 2RP 158. Unlike her trial testimony, KR told Ms. Coslett about various types of touching, including being forced to touch Mr. Fey's penis at different times and described the painful nature of the incidents. Ex. 33RP 11-19, 22-25, 27-31.

During closing argument, the prosecutor emphasized the "integrity" of the child interview specialist, who was trained to conduct interviews with children and knew how to elicit "non-suggestive" and "non-leading" descriptions of events. 5RP 631. The "specific details" KR offered about the incident and which demonstrated that the accusation was true occurred in the forensic interview, not during trial testimony. 5RP 632-33. As the prosecutor argued to the jury, she gave "much more detail in the forensic interview than she did on the stand." 5RP 635.

A tactical decision by counsel must be based on a reasonable trial strategy to pass Sixth Amendment muster. *Sears*, 130 S.Ct. at 3265. Stipulating to the admission of an otherwise inadmissible out-of-court statement containing detailed allegations of sexual abuse had no objectively reasonable and legitimate purpose. When questioning KR, defense counsel barely mentioned her interview with Ms. Coslett and

primarily asked about inconsistent statements to the defense investigator or prosecutor. 2RP 200, 203-04, 207-09. Even if defense counsel wanted to point out some inconsistent statements KR made to Ms. Coslett, that impeachment could have been accomplished without stipulating pre-trial to the entire interview as substantive evidence. *Clinkenbeard*, 130 Wn.App. at 569-70. There is no conceivable, legitimate tactical reason to offer substantive allegations likely to have formed the basis of the convictions that would not have been admissible.

b. *The stipulated introduction of the lengthy forensic interview containing numerous uncharged offenses prejudiced the outcome of the case.*

An attorney's deficient performance requires reversal when there is a reasonable probability that the outcome could have been different without the error. *Strickland*, 466 U.S. at 694. A defendant is not required to prove that he would not have been convicted but for the error. *See e.g., House v. Bell*, 547 U.S. 518, 552-53, 126 S.Ct. 2064, 2086, 165 L.Ed.2d 1 (2006) (reversing for ineffective assistance based on new evidence where, even though jury might disregard new evidence, it "would likely reinforce doubts" as to defendant's guilt). The reasonable probability standard requires only that the error was sufficiently material that it undermines confidence in the jury's verdict.

Nix v. Whiteside, 475 U.S. 157, 175, 106 S.Ct. 988, 89 L.Ed.2d 123 (1986).

Here, it is reasonably probable that the jury's verdict is premised on evidence that arose only in the forensic interview. Her testimony described a single incident of touching her vagina without much explanation, so that based on her in-court testimony, the touch could have been inadvertent or so minimal that it did not show it was for purpose of sexual gratification, a necessary element of the charged offense. RCW 9A.44.010(2); RCW 9A.44.083. But KR gave Ms. Coslett far more explicit sexual details about the one incident she could recall and others incidents as well. The State invited the jury to base its verdict upon allegations mentioned only in the interview with Ms. Coslett, not at trial, and it used the details KR gave to Ms. Coslett as evidence of her accuracy and reliability. 5RP 636. Because it is reasonably probable that the jury's verdict rested on evidence that would not have been admitted absent defense counsel's stipulation to a lengthy, videotaped interview, counsel's unreasonable decision to stipulate to the videotape's admission prejudiced Mr. Fey.

3. **The sentence unlawfully deprives Mr. Fey of his parental right to a relationship with his own children**.

A parent has a fundamental liberty and privacy interest in the care, custody and enjoyment of his child. *Troxel v. Granville*, 530 U.S. 57, 65-66, 120 S.Ct. 2054, 147 L.Ed.2d 49 (2000); *Santosky v. Kramer*, 455 U.S. 745, 753, 102 S.Ct. 1388, 71 L.Ed.2d 599 (1982); *State v. Ancira*, 107 Wn.App. 650, 653, 27 P.3d 1246 (2001).

A sentencing court may not impose a no-contact order between a defendant and his biological child as a matter of routine practice. *In re Pers. Restraint of Rainey*, 168 Wn.2d 367, 377-82, 229 P.3d 686 (2010). Instead, the court must consider whether the order limiting contact is "reasonably necessary in scope and duration to prevent harm to the child." *Id.* at 379. The trial court's authority to impose "crime-related prohibitions" as a condition of sentence does not extend to conditions that interfere with a fundamental constitutional right. *Id.* at 374-75; RCW 9.94A.505(8). Conditions that interfere with a fundamental constitutional right "to the care, custody, and companionship of one's children . . . must be 'sensitively imposed' so that they are "reasonably necessary to accomplish the essential needs of the State and public order." *Rainey*, 168 Wn.2d at 374-75.

Alternatives such as indirect contact or supervised contact may not be prohibited as a sentencing condition unless there is a compelling State interest in barring contact. *See State v. Warren*, 165 Wn.2d 17, 32, 195 P.3d 940 (2008) (no-contact order with defendant's children lawful only where no reasonable alternative way to achieve State's interest); *Ancira*, 107 Wn.App. at 655 (blanket no-contact order "extreme and unreasonable given the fundamental rights involved," where less stringent limitations on contact would successfully realize the State's interest in protecting the children").

Without mentioning its impact on Mr. Fey's right to have a relationship with his own children, the court entered conditions of community custody that curtailing the parent-child relationship for Mr. Fey's biological children, Hailey and Ember, who were six years old at the time of trial. 4RP 423, 465, 574. These conditions are imposed for the duration of Mr. Fey's lifetime and the lifetime duration "must also be reasonably necessary" for a restriction on a person's liberty to be permitted. *Rainey*, 168 Wn.2d at 381.

Condition four states that Mr. Fey may not "initiate or prolong contact with minor children without the presence of an adult who is knowledgeable of the offense and has been approved by the supervising

Community Corrections Officer." CP 33. Condition six says he may not "frequent areas where minor children are known to congregate, as defined by the Community Corrections Officer." *Id.* Condition eight states that Mr. Fey may not "date women or form relationships with families who have minor children, as directed by the supervising Community Corrections Officer." *Id.* Condition nine bars Mr. Fey from "remain[ing] overnight in a residence where minor children live or are spending the night." *Id.*

None of these conditions contain any provisions for Mr. Fey's ability to contact his own children or his wife, who is the mother of minor children. They appear to bar Mr. Fey from communicating with his own family for as long as his own children are minors.

In *Rainey*, "given the fact-specific nature of the inquiry," the court struck the no-contact order between father and daughter and remanded for resentencing "so that the sentencing court may address the parameters of the no-contact order under the 'reasonably necessary' standard." 168 Wn.2d at 382. Likewise, there was no explanation for entering these boilerplate conditions that interfere with Mr. Fey's fundamental right to have a relationship with his own children. Remand for resentencing is required.

F. CONCLUSION.

Mr. Fey's conviction should be reversed due to the deprivation of his rights to a fair trial and effective assistance of counsel. Alternatively, his sentence must be modified so it does not impermissibly deny him a relationship with his children.

DATED this 28th day of January 2014.

Respectfully submitted,

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Washington Appellate Project (91052)
Attorneys for Appellant

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

STATE OF WASHINGTON,	)	
	)	
Respondent,	)	
	)	NO. 70443-5-I
	)	
	)	
JAMES FEY,	)	
	)	
Appellant.	)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 28TH DAY OF JANUARY, 2014, I CAUSED THE ORIGINAL **OPENING BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS – DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

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STATE OF WASHINGTON
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SIGNED IN SEATTLE, WASHINGTON, THIS 28TH DAY OF JANUARY, 2014.

X_____

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